IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent,

vs.

ANTHONY GILBERT DELGADO

Defendant and Appellant

Case No. S089609

Kings County
Superior Court
No. 99CM733

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Kings

HONORABLE JUDGE PETER M. SCHULTZ

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. ANTHONY GILBERT DELGADO *Defendant and Appellant.*	No. S089609 Kings County Superior Court No. 99CM7335

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Pen. Code, § 1239, subd. (b).

INTRODUCTION

The first time appellant, Anthony Delgado, met his prospective attorney, Donna Tarter, she was accompanied by uniformed correctional officers employed at Corcoran State Prison, where appellant was, and had been, incarcerated for three years. After that, at least two, and sometimes three, correctional officers, heard every word spoken between appellant and his counsel at every attorney-client meeting before and during his capital trial, a trial where appellant stood accused of the murder of two Corcoran prison inmates, as well as a minor assault on a Corcoran guard.

It would have been natural for a prisoner such as appellant, who had been in state prison for thirteen years at the time of the first capital offense,

to be wary of any prison guard, but the guards who were privy to the conversations between appellant and attorney Tarter were not just any guards, they were from Corcoran itself. They were colleagues and/or underlings of many of the trial witnesses. Moreover, by the time of trial, Corcoran Prison had been the focus of intense media attention. The impact of the presence of Corcoran guards during appellant's meetings with counsel cannot be isolated from the history of Corcoran and its guards that had been unfolding in the press.

Up until the mid-1990's, correctional officers were protected by an impenetrable veil of secrecy, although prisoners such as appellant knew the details all too well. But when newspapers began to expose the lawless culture of violence by guards against inmates, the wall of loyalty and silence that Department of Corrections personnel erected to protect themselves from scrutiny and punishment began to crumble.

Corcoran was especially notorious for the use of force by guards against prisoners. Guards used lethal force whenever they perceived there was a fight between prisoners on the yard. (Diaz, *Prison Guard Kills Inmate at Corcoran*, Fresno Bee (Sept. 11, 1993) p. B1.) In 1995, news reports began to surface about allegations that guards at Corcoran *intentionally* provoked fights between inmates and/or set up more vulnerable inmates by placing them on exercise yards with known enemies or much more dangerous prisoners in order, to justify shooting at the inmates. (Calkins, *Inmate Survivor's Sue Prison,* Fresno Bee (April 2, 1995) p. B1; see also, Bier, *No Delay in Prison Suit,* Fresno Bee (February

27, 1996) p. B1.)[1] The complaints spurred a civil rights investigation by the FBI, which ultimately led to the February 1998 indictment of eight correctional officers for staging so-called gladiator fights between prisoners. (Bier & Lewis, *Eight Correctional Officers Indicted*, Fresno Bee (February 27, 1998) p. A1.)

News stories also described the Security Housing Units [SHU] and the yards at Corcoran, where appellant was incarcerated at the time of the capital offenses in this case:

> Tiers in the SHU are arranged so that one guard can look into every cell from a single vantage. An officer with two weapons hovers about the concrete sliver of a recreation yard. Seemingly nothing is left to chance. [¶ . . .¶] The premise of the unit is to make the prison safer by segregating the most violent inmates [¶ . . .¶] Guards watching the yard were armed with a .37-millimeter gas gun that discharges five small wood blocks and .9-millimeter carbine rifle. The blocks were not meant to kill, but to break up fights in which one inmate threatens "imminent bodily harm" to another. If the gas gun did not stop the fighters, the deadlier carbine was to be used. [¶ . . .¶] In a ritual they say became known as "gladiator day," officers in the SHU and their supervisors staged fights between inmates. Rather than release inmates sequentually[*sic*], officers would send known enemies from different tiers into an empty yard.

(Arax, *Tales of Brutality Behind Bars*, L.A.Times (August 21, 1996) p. A-1.)

When the prison staff began to lodge complaints about their coworkers' use of force and the staging of fights, the warden turned a blind

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1. During this same time period, the prison began investigating the beating of 36 prisoners by guards at Corcoran after the prisoners were transferred from Calipatria State Prison. (Podger, *Prison Inquiry Widens*, Fresno Bee (May 25, 1996) p. A1.)

eye. Officers were expected to remain loyal. The administration of the CDC sided with the prison warden. (Arax, *Tales of Brutality Behind Bars*, L.A.Times (August 21, 1996) p. A-1.)[2] Four of the officers in the "gladiator" investigation also were charged with conspiracy to falsify reports in an attempt to cover up one inmate death. (Bier & Lewis, *Eight Correctional Officers Indicted*, Fresno Bee (February 27, 1998) p. A1.) The CDC itself maintained the "code of silence" by trying to cover up internal reports that guards were staging fights at Corcoran. The Department of Corrections attempted to prevent a guard from providing prison records to the FBI for its investigation, and even followed the guard and federal agents in a high-speed car chase. (Holding, *Accusations of Prison Coverup, supra.*) One ex-Lieutenant explained that the CDC didn't want the violence to stop, because the violence was a tool to convince the public that more money was needed for more prisons and more security. (*Ibid.*)

In February 1997, California's legislative analyst's office reported that the CDC failed to deter, investigate or punish personnel misconduct. (Holding, *State Report Blasts Handling of Prisons Probe*, S.F. Chronicle (February 20, 1997) p. A-1.) In 1998, newspaper coverage also described allegations that guards at Corcoran's SHU had intentionally housed a vulnerable inmate in the same cell with a known enemy and sexual predator, had ignored the inmates' pleas for help, and then enforced a code of silence to cover-up their wrongdoing. (Arax, *Ex-Guard Tells of Brutality, Code of Silence*, L.A. Times (July 6, 1998) p. A-1.)

In July, 1999, after appellant killed James Mahoney on a Corcoran

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2. Corcoran Warden George Smith retired in July, 1996. (Arax, *Tales of Brutality Behind Bars, supra.*)

SHU yard without any intervention by guards, the public learned that appellant had been sent to the yard with Mahoney even though he had already admitted killing Mendoza. Mahoney's death was described as "another black eye" for Corcoran and was linked to erroneous classification decisions within the prison administration and a lack of supervision on the yard by individual correctional officers. (Lewis & Quach, *Prison is Under Fire Over Killing,* Fresno Bee (July 9, 1999) p. A1.)[3]

It thus was well-known by the time of appellant's trial that the guards at Corcoran were not trustworthy, would protect their own at any cost, and that supervisors at both the prison and administration level of the CDC not only were capable of, but actually did cover-up violations of inmates' rights. Despite this, before and during trial, Corcoran prison guards were allowed to sit in on every attorney-client meeting between appellant and his appointed attorney, without his consent or waiver. (See Argument I, *infra.*) Although a few, but not all, of these guards were admonished and casually agreed not to reveal appellant's confidences, those assurances could not be credited in the prison culture of secrecy and loyalty, especially in a case such as this where prison guards and officials themselves were publicly accused of (and facing civil liability for) causing "another black eye" for Corcoran. Under these circumstances, without the

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3. Despite the heightened attention on Corcoran and all the inmate deaths there during this time period, remarkably, there was absolutely no newspaper coverage following the October 1998 death of appellant's cellmate, Frank Mendoza. It was only after appellant killed Mahoney that the media expressed any interest in the appellant or in the death of Mendoza. Indeed, the lack of media concern was a reflection of the attitude of Corcoran and CDC officials to the killing a life prisoner: appellant was not charged with any crime for eight months after he admitted killing Mendoza, and then, only after he had been accused of *another* murder.

benefit of any private defense communications and the concomitant guarantee of confidentiality, appellant stood no chance of a fair trial.

STATEMENT OF THE CASE

By an information filed on October 19, 1999, appellant was charged in Kings County Superior Court case number 99CM7335 with seven counts. In Count I, appellant was charged with the September 30, 1998 assault with great bodily injury by a life prisoner on Frank Mendoza, with an additional allegation that Mendoza died within a year and a day from the date of the assault. (Pen. Code, § 4500.)[4] In Count III, the same acts that gave rise to Count I were used to charge appellant with the murder of Frank Mendoza. (Pen. Code, § 187, subd. (a).) A special circumstance allegation of lying in wait was charged in connection with Count III. (§ 190.2, subd. (a)(15).) In Count II, appellant was charged with the July 2, 1999 assault with great bodily injury by a life prisoner on James Mahoney, with an additional allegation that Mahoney died within a year and a day from the date of the assault. (§ 4500.) In Count IV, the same acts that gave rise to Count II were used to charge appellant with the murder of James Mahoney. (§ 187, subd. (a).) Special circumstance allegations of lying in wait, (§ 190.2, subd. (a)(15)), and multiple murder were charged in connection with Count IV. (§ 190.2, subd. (a)(3).) In Count V, appellant was charged with battery by a prisoner on a non-confined person [officer Mares], alleged to have occurred on October 20, 1998. (§ 4501.5).) In Count VI, appellant was charged with possession of a sharpened instrument by a person in a penal institution, also alleged to have occurred on October 20, 1998. (§ 4502, subd. (a).) It also

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4. All further statutory references are to the Penal Code unless otherwise noted.

was charged that appellant had two prior prison terms for serious felony convictions with deadly weapon enhancements under Penal Code sections 667.5(d) and (e) and section 1170.12. (1CT 13-16.)[5]

At an in camera hearing held before arraignment and the appointment of counsel, the court agreed to allow correctional officers employed at Corcoran State Prison to attend all attorney-client conferences before and during trial. Appellant was not present at this hearing, and the transcript was sealed by the court. (8/6/99 CCT 15-21.)[6]

Defense attorney Tarter filed no written motions before or during the guilt phase of appellant's trial, with the exception of one motion for a continuance. (1CT 18.) The prosecution filed in limine motions for the "Exclusion of Evidence Pertaining to the Death Penalty as a Deterrent and Relative Cost" (1CT 56), for an " Evidence Code 402 Hearing" seeking admission of the videotapes of two of the charged crimes (1CT 58), and for another " Evidence Code 402 Hearing" on the admissibility of appellant's "Spontaneous Statements" (1CT 72), which itself was supported by two separate written memoranda of points and authorities. (1CT 62-71, 76-77.) Defense attorney Tarter filed no written opposition to these motions, and did not object to introduction of any of the taped evidence. (1RT 99.) The prosecutor also filed a trial brief entitled "Photos of Victims and Crime Scene are Admissible" (8CT 2310). The defense filed no trial briefs during the guilt phase.

Following his jury trial, appellant was found guilty of all counts and

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5. "CT" refers to the Clerk's Transcript on appeal; "RT" refers to the Reporter's transcript on appeal.

6. "CCT" refers to the King County Consolidated Courts Clerk's Transcript on appeal.

enhancements as charged. The lying in wait and multiple murder special circumstances were found true. (9CT 2486-2492.) Both prior convictions were found to be true. (9CT 2493-2394.)

Defense Attorney Tarter filed no written motions or trial briefs before or during the penalty phase of appellant's trial. The prosecution filed two penalty phase trial briefs entitled: "Inconsistent Sentencing for Single Incident" (9CT 2669) and "Defendant's Prior Cell Extraction & Weapon Possessions are Admissible" (9CT 2672).

Following the penalty phase, the jury returned two separate verdicts of death for the killing of Mendoza, one for Count I and one for Count III. The jury also returned two verdicts of death for the killing of Mahoney, one for Count II and one for Count IV. (9CT 2690-2693.)

Before sentencing, the prosecution filed a "Sentencing Memorandum and Statement in Aggravation." (10CT 2779.) Defense counsel filed no sentencing memorandum or statement in mitigation. The automatic motion for modification of sentence was denied at a sentencing hearing on June 21, 2000. The court imposed a sentence of death for the two murder convictions, Counts III and IV, and stayed sentencing on Counts 1 and II pursuant to Penal Code section 664. The court additionally imposed a sentence of 25 years to life for Count V; and a sentence of 25 years to life for Count VI, both of which were to run consecutively to a prior prison sentence. (RT 1741-1743; 9CT 2815-2822.)

STATEMENT OF FACTS

A. The Evidence Presented at Trial - Guilt Phase

1. The Death of Frank Mendoza

a. Testimony of Correctional Staff

On October 1, 1998, appellant was housed at facility 4-B-2 Left in the Security Housing Unit [SHU] at Corcoran, which is the highest level of security housing.[7] All cells in the SHU were two-men cells, but sometimes an inmate was single-celled. The classification committee decided whether an inmate could have a cellmate based on his history of violence. Inmates had to be eligible to have a cellmate. (3RT 598.) The inmates did not get to decide who they were housed with. (3RT 532.)

A SHU cell at Corcoran is approximately 8-10 feet wide and 12-14 feet deep. (3RT 598.) There are two cement bunks with cubbyholes for storage. The space between the two bunks is barely wide enough for one inmate to stand in. There is a window out to the back, a stainless steel toilet, a sink and a light switch. (3RT 566; P-Ex 12.)[8] At the time of the crimes here, SHU inmates generally stayed in their cells 24 hours a day. (3RT 563.) They were allowed only 10 hours a week on the yard and could only leave their cells for showers and medical appointments. (3RT 533-535.)

At 11:15 p.m. on September 30, 1998, when doing a count of the

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7. The facts in this section were presented through the direct and cross-examination testimony of prosecution witnesses John Montgomery, Craig Williams and Frank Carmona, all of whom were correctional officers at Corcoran at the time of the crimes, and through the physical evidence.

8. Prosecution trial exhibits are designated as "P-Ex," followed by the exhibit number or letter.

inmates, floor officer Faustino Carmona, Jr., passed by Cell 3 and saw appellant and his cellmate, Frank Mendoza. Carmona testified that both men were lying on their bunks and the television in the cell was on. The cell lights were on and uncovered at that time. (3RT 541.) After finishing the count, Carmona and another floor officer went to the office to prepare paperwork. They had no visuals of any inmates from the office, only the control booth officer did. (3RT 559.)

Just after midnight, officer Craig Williams, stationed in the unit control booth, saw appellant in his cell, waving his hands. (3RT 512.) The floor officer was responsible for reporting problems in the cells because the control booth officer could not see inside all the cells from the booth. (3RT 526.) Williams could not see directly into Cell 3. (3RT 522.) Williams testified that he could not see into appellant's cell that night because the unit floor light was dimmed at night and the light in the cell was blacked out. (3RT 513-514.) It was against the rules for an inmate to cover the light in his cell (3RT 526), but appellant had not received a rules violation for covering the lights that night. (3RT 550.)

When an inmate wanted to get the control booth officer's attention, he simply would yell out. There were windows in the booth that could open on to the unit, and it was usually quiet late at night because the inmates are sleeping. (3RT 552.) But it was unusually noisy in appellant's section of the unit on October 1 (3RT 541, 543), and there was a lot of noise from radios, televisions and from inmates yelling at each other. (3RT 528-530.)

After Williams saw someone waving his hands in Cell 3, he asked Carmona, the floor officer, to check appellant's cell. (3RT 523.) Carmona was not on the floor at the time, but in the office. (3RT 539-540.) At 12:10 a.m. Carmona left the office to look into Cell 3. He saw Mendoza laying

face down on his knees between the two bunks. (3RT 539-540.) Appellant did not say anything to Carmona, but lifted Mendoza's neck up and let it down again; Mendoza did not respond. (3RT 542-543.)

The cells were all deadlocked for the night, and therefore, the control booth operator could not open the cell doors from the booth. To open a cell, the control booth operator had to pass a key to the "floor officer." (3RT 516-517.) Carmona asked Williams for the key to unlock the cells. (3RT 523; 544.)

John Montgomery, an officer assigned to the Corcoran Investigative Services Unit (ISU) arrived at the unit at 1:30 a.m. Mendoza's body was still in Cell 3 when he arrived. Mendoza was wearing a tee-shirt with writing on the back that said: "There's consequences to everything. He paid his and I'm to pay mine, too. Torro." (3RT 580-581.) There were three separate cloths wrapped around Mendoza's head, tied in three separate knots. (3RT 583, 586.) No weapons or sharpened items were found in Cell 3. (RT 596-597, 632, 648.) The cell was searched, but no inventory was made of the items found there. (3RT 648.)

b. Appellant's Taped and Videotaped Statements

Kings County District Attorney investigator Randy Ebner interviewed appellant at Corcoran at 3:30 a.m. on October 1, 1998. Correctional personnel Mike Alaniz and Sgt. Venezuela were present. The interview was tape recorded. The tape, P-Ex 38, was played, and a transcript was provided to the jury (3RT 710; 8CT 2330-2367; P-Ex 38A.) A little after 10:00 a.m., some six and a half hours after the first interview, appellant was interviewed again by Ebner. He complained that he had been in a holding cell, standing and in hand cuffs for over ten hours, and was anxious to sleep and take a shower. Nonetheless, he agreed to re-enact the

crime on videotape. A tape of this interview also was played for the jury and a transcript provided. (4RT 726; 1CT 116-119; P-Ex 39B.) The following section is a summary of appellant's initial interview and the videotaped "re-enactment," which also was played for the jury. (RT 733, P-Ex. 21A; 2CT 484-503, P-Ex 21B.)

At the time of Mendoza's death, appellant had been incarcerated in California for 13 years, and had spent approximately 11 of those years in SHU units. He had already been in the SHU at Corcoran for two years and had spent so much time "in the hole" that for him "everything [was] dark." Appellant had been prescribed Sinequan,[9] but did not always take it. On the night of the crime, Mendoza had asked for, and taken one of appellant's pills.

Mendoza and appellant were both life prisoners, but unlike appellant, Mendoza had four life sentences and had killed before. Although appellant and Mendoza had agreed to be housed together, Mendoza was verbally and physically aggressive. Mendoza also repeatedly bragged about his prior gang activity in Nuestra Familia, from which he was an official gang "dropout," and appellant had asked him to stop many times. Appellant didn't ask for a cell change because he didn't think the staff would do anything and would just say appellant wasn't "programming," i.e., that he wasn't doing what was expected of him.

Appellant claimed that he had decided to kill Mendoza that

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9. Sinequan, or Doxepin is a powerful tricylcic antidepressant with known side-effects of suicidal ideation; extreme worry; agitation; panic attacks; difficulty falling asleep or staying asleep; aggressive behavior; irritability; acting without thinking; severe restlessness; and frenzied, abnormal excitement. (See, http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0000668.)

afternoon. He jammed the cell door with papers and cloth. Appellant and Mendoza watched TV in the cell. When Mendoza leaned over to change the channel, appellant got behind Mendoza and put an arm around his neck. He stated that he had held Mendoza in a "full Nelson" for a little over four minutes, and then tied sheets and a sock around his head and neck to be sure he was dead.

c. Forensic Evidence

Forensic pathologist John Dollinger conducted the autopsy of Mendoza. (3RT 651-677.) Mendoza was 5'11", approximately 200 lbs and about 52 years old. The autopsy revealed evidence of prior brain surgery and there were aneurism clips near his right carotid artery. (3RT 661.)

There was a pillow case over the upper part of Mendoza's face and a strip of sheet around the lower part. (3RT 653-654.) During the autopsy, a sock was removed from Mendoza's mouth. (3RT 607) The cause of death was mechanical or vascular asphyxiation from strangulation. (3RT 657.)

In response to a hypothetical question based solely on appellant's statement, Dollinger testified that Mendoza's injuries "were consistent" with someone placing Mendoza in a head lock for four minutes, wrapping a sheet around his neck and tying a sock in a knot around the mouth. Because there was no bruising on his face, Dollinger was certain that Mendoza was already dead when the ligatures were applied. (3RT 688-689.) It was possible the victim could have been resuscitated immediately with medical care. (3RT 667.)

2. Battery of Erik Mares/Possession of Sharp Instruments

a. Testimony of Correctional Staff/Extraction Videotape

On the afternoon of October 20, 1998, appellant was in his cell in a SHU unit at Corcoran, when floor officer Prentis Uyeg went to appellant's

cell to escort him to a shower. Uyeg cuffed appellant through the "food port." The food port is approximately 18" wide, 4" high and 3" deep and is designed to allow food trays to be provided to inmates without any contact with correctional staff. (4RT 736-739.) Pursuant to SHU procedures, appellant backed up to the food port with his hands behind his back so he could be handcuffed before the cell door was opened. Once Uyeg had cuffed only appellant's left hand, however, appellant moved towards the center of the cell with the handcuffs attached. Uyeg closed the food port and contacted the control booth officer through the intercom. Appellant did not respond to Uyeg. Uyeg testified that appellant covered the door and the window in the door with wet paper and that he could not see in the cell. He asked appellant what was bothering him. He testified that appellant responded that the conversation was over and that he was "taking it to the next level." (4RT 742-743.)

Correctional officer John Vasquez was directed to watch appellant to see if he wanted to come out of the cell. Contradicting Uyeg's testimony, Vasquez testified that when he arrived at appellant's cell, the door and window were not, in fact, covered. (4RT 752.) Vasquez saw appellant, kneeling between the bunks, holding a folded mattress in front of him. (4RT 747-748.) Vasquez testified that staff next sprayed "OC pepper spray"[10] into the cell to make appellant come out. According to Vasquez, after the first burst of spray, appellant rushed towards the door, holding the mattress like a shield. The spray caused Vasquez to cough, and made his eyes and nose run. (4RT 751-752.)

Correctional staff videotaped the procedures, beginning with the

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10. "OC" stands for "Olescin Capsicium."

spraying of the pepper spray. A redacted videotape was played for the jury and a transcript was also provided. (4RT 865; P-Ex 100; 8CT 2395-2400; P-Ex 100A.) On the videotape, a team of correctional officers enters the unit. Through the cell door, a mattress can be seen upright in the back of the cell; appellant is crouched behind the mattress. After asking appellant to come out voluntarily, the guards announce they are going to use pepper spray, and then release something into the cell. Appellant does not move or respond. Over a period of approximately 10 minutes, and with additional warnings, a substance is sprayed again, three-four times. Coughing and sneezing noises increase with every burst. A few times, it appears that appellant attempts to stand up, still using the mattress as a shield, but then crouches down again. After announcing the spray is "losing its effect," the officers state that they are assembling an "extraction team." (P-Ex 100.)

Correctional staff testified that the extraction team usually consisted of four men:[11] a shield man who entered the cell first with a plexiglas riot shield, the second man carried handcuffs, the third man carried leg irons, and the fourth man was the back-up. (4RT 752-753.) In this instance however, there was a fifth member of the team, a "utility man." (4RT 759-761.) The team members all wore protective vests on their upper bodies, helmets, and elbow pads and knee pads, like a baseball catcher. Some wrapped towels around their necks as additional protection. (4RT 778.)

When the cell door was opened, the first man in was officer Cody, who weighed 300-325 lbs and was about 6'2". (4RT 762-764.) Officer Brian Kee was the second man into the cell, behind the shield man. He was

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11. Facts summarized in this section were adduced from the testimony of officers Vasquez, Kee and Casteneda.

6'1" tall, and weighed approximately 230 lbs. Correctional officer Erik Mares was the fourth man on the team, responsible for leg restraints. (4RT 782.) Joe Casteneda was 5'11" and weighed 220 lbs. He was the fifth man in the cell. (4RT 762-764.) No information was presented concerning the third man on the team.

The officers testified that appellant was crouching behind the mattress in back when the extraction team entered. Some claimed appellant rushed toward them with his mattress, (4RT 754-756, 762-764), but the second man into the cell denied that he did so. (4RT 779).[12] Similarly, some officers testified that the floor was slippery (4RT 754-756, 770-776), but others did not. Castaneda said he was "told" after the fact that something had been put on the floor to make it slippery. (4RT 762-764.) When the team entered, appellant was swinging his arms and punching. (4RT 770-776). Kee, the second man in, testified that appellant had a weapon in his left hand with a cloth handle and a sharp point. Kee threw the weapon to the right side of the cell. He then cuffed appellant's left hand. (4RT 770-776.) However, he didn't see the handcuff that was supposedly on appellant's left hand or notice anything at all unusual about appellant's hand. (4RT 776; 780-781.)

Mares, the fourth man in, crouched down with his left knee on the floor, and put his left shoulder on appellant's torso to keep him from standing up. (4RT 783-786.) Vasquez, who was standing outside the cell, at least 10 to 15 feet away (4RT 753), testified that he saw appellant reach his arm over the shield and strike one of the men with fast movements. He claimed he saw a little pointed object protruding from appellant's fist. All

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12. Cody, the shield man and the first man in, did not testify.

the men were on top of appellant and Vasquez moved closer, about five feet away. He saw a sharp object that looked like plastic with a blue cloth handle on the floor and reached between one of the officer's legs to retrieve it. (4RT 754-756.)

According to Casteneda, Mares grabbed appellant by the waist and appellant struck Mares in the left shoulder. He testified that he saw a point in appellant's hand. Appellant fought until they had him restrained. Casteneda claimed that after this, he managed to pull appellant's arm back behind appellant's back so he could be cuffed. (4RT 765-767.) He didn't notice if there were already a set of cuffs on appellant. (4RT 768-769.) Mares testified that he got a hold of appellant's legs, but appellant resisted. He, too, claimed the credit for shackling appellant, who was then removed from the cell. (4RT 783-786.)

The videotape of the extraction provided no additional information. All that can be seen is a group of guards in riot masks, vests and gloves swarming into a cell and piling on top of appellant. There were noises, grunts and other signs of struggle, and after a few minutes, appellant was restrained and carried out of the cell horizontally. (P-Ex 100.)

After appellant was cuffed, he was escorted outside the building for decontamination. They used cold water to decontaminate him from the pepper spray. (4RT 777.) Appellant had abrasions and red marks on his shoulder, face, chest and back. He had a lump on his cheek and his wrists were swollen. (4RT 834-840.)

Five minutes after the extraction, Mares felt a burning on the back of his left shoulder. (4RT 789-90.) He had a shallow little cut on his left shoulder. (4RT 797.) He claimed he had "muscle damage" and missed a month of work due to his injuries. He also did stretching exercises in

physical therapy. (4RT 800-801.) No corroboration was presented regarding the nature or extent of his injuries.

Following the extraction, a weapon was found on the right bunk of appellant's cell. It was plastic with a paper and cloth handle. (RT 811-812.)

b. Appellant's Taped Statement

While appellant was in the medical clinic, he was interviewed by correctional officer Alaniz. A tape of the interview was played for the jury, and a transcript was provided. (4RT 854; P-Ex 82A, 8CT 2372-2381; P-Ex 82B.)[13] During the interview, appellant provided multiple reasons for forcing the extraction: although he said that he forced the extraction because he was bored,[14] he also said it was because had seen the officers laughing and smirking when another inmate peed on himself and couldn't hold his food tray. The inmate didn't get fed for three days after that. Appellant admitted making the weapons and that he was holding both weapons during the extraction. The weapons were just plastic and thus were too flexible to actually penetrate. (8CT 2372-2381.)

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13. After the tape was played and an officer testified that the transcript was accurate, the court noted for the record that there were significant errors in the transcript. On page 4 (8CT 2376), it says, "another officer was holding me" while appellant said "was over me." On page 5 (8CT 2377), the transcript says "It was classic" while appellant said "it was plastic." On page 6 (CT 2378), the transcript says "the fear is gone" while appellant said "the appeal is gone." (RT 855-856.)

14. In an interview conducted after the Mahoney killing, appellant explained that when he had told Alaniz he forced the cell extraction involving Mares because he was bored, he only said that to avoid "more bullshit." (CT 2410.)

3. The Death of James Mahoney, Jr.

a. The Scene of the Crime

All the SHU buildings at Corcoran had the same construction. Each had an A,B, and C section, and two exercise yards.[15] (3RT 520, 533.) The control booth officer was stationed on the second floor of the section and was locked into the area (3RT 569.) There were weapons and gas in the control booth. The officer's station was on the first floor, beneath the control booth. The area below the control booth on the first floor was called the rotunda. (3RT 570-71.) Inmates went from the rotunda to the yard sallyport before being let out on to Yard 1 or Yard 2. There was a concrete wall separating the two yards that ran the length of each yard, from the door to the back wall. Yard 1 was between 50-75 feet deep from the entry door to the far wall, but the yard was pie shaped so the width varied. (3RT 574.)

When inmates were on the yard, there was a gunner in the control booth above the sallyport, who watched and provided security for the two yards. (3RT 591; 4RT 906-907.) The gunner was supposed to be in the observation area, looking out on the yards whenever there was more than one inmate on one yard at the same time. He was not supposed to leave the post and had to watch the yard constantly. That was his only job. He was supposed to stop fights. (3RT 591, 593.) Even when inmates were on both yards at the same time, there was only one officer watching from the booth. There also were video cameras. (3RT 574.)

The gunner's station was above ground and had a view of both

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15. The following facts were adduced from the testimony of correctional officers John Montgomery and Robert Todd.

yards. The gunner was above the wall between the two yards, and the wall did not obstruct his view. (4RT 906-907.) From the gunner's position, he was able see the entire area of Yard 1. (5RT 1036.) At the time of the crime, the inmates were allowed on the yard for three and a half hours at a time. (4RT 906.)

All correctional officers had to "qualify" annually, but to be assigned as a gunner, an officer had to qualify every three months. If there were no qualified officers available, a non-qualified officer could be temporarily assigned as a gunner by the sergeant. (3RT 593-595.) The gunner had guns or launchers that fired bullets as well as "non-lethal" projectiles.[16] They were used to quell fights. If a fight broke out, the gunner was supposed to yell at the inmates to stop and get down, then pick up the .37 mm grenade launcher and tell them to get down again. The gunner would load the launcher and get ready, and yell again for the inmates to get down. If the inmates didn't comply, the gunner fired blocks in front of the inmates. The blocks would bounce off the ground and then hit the inmates, rather than striking them directly. The gunner had the option to use a rifle with more deadly force in a life-threatening situation. (5RT 1036-1037.)

b. Events of July 2, 1999

On July 2, 1999, correctional officer Robert Todd was working as a floor officer in SHU Unit 4-B-Right. Although he had been assigned as a gunner for the yard that day, he wasn't qualified. Because he wasn't qualified, he switched positions with officer Mexicano. (4RT 877-878.)

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16. These projectiles are now considered "less lethal" rather than non-lethal. (6RT 1255.)

Mexicano volunteered to take his place. (4RT 908-909.)[17]

Officer Todd processed inmates onto Yards 1 and 2 that day. 20 inmates were released onto Yard 2 first. (4RT 888.) Then, James Mahoney, Jr. and appellant were released onto Yard 1. Appellant and Mahoney were the only two inmates on Yard 1 that day. Todd did not see any problems between them. (4RT 881-886.)

The decision to put Mahoney and appellant alone together on a yard was made by a committee. (4RT 915.) Appellant himself explained how this happened during an interview with DA investigator Ebner and correctional officer Alaniz, which was tape recorded and played for the jury. (RT 1000-1001; P-Ex 144; 9CT 2401-2456; P-Ex 144A.) No other evidence on the issue was presented.

After the death of Mendoza, appellant was single-celled and placed on walk alone status.[18] Appellant had no physical contact with anyone between the October 20, 1998 cell extraction and July 2, 1999. After October 20, 1998, he was moved from cell to cell about every two weeks. Every time appellant got to know his neighbors, he would be moved to a different location. He believed that officers intentionally moved him to keep him disoriented. Appellant explained that, at his last committee hearing, his counselor recommended that he be kept on walk alone status, but that the lieutenant decided to give him a chance. On July 2, when he was released onto the yard with Mahoney, it was the first time he had been on the yard with another inmate since the Mendoza incident. (9CT 2401-

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17. Mexicano did not testify.

18. It was not unusual for SHU inmates to be single-celled or for them to be "walk-alone" on the yard. (3RT 599.)

2456.)

SHU yards were monitored by video cameras. An edited version of the video of the activities on Yard 1 between appellant and Mahoney was prepared and played for the jury. (5RT 1031; P-EX 148) The edited tape was two hours and three minutes in length. (5RT 1024.)[19] According to officer Montgomery, who narrated portions of the tape while it was played for the jury, prior to any physical contact, Mahoney and appellant were walking the yard and talking together in "normal" yard interactions. (5RT 1029.) Appellant then hit Mahoney with his fists and kicked him for less than 30 seconds. Mahoney fell and remained sitting on the ground. After that, appellant walked away, returned to Mahoney, and walked towards the end of the yard, directly beneath where the gunner was stationed. On the tape, appellant is seen repeating these actions, walking up and down the yard and repeatedly looking up at the gunner's station, for a period of about eight minutes. (P-Ex 148.)[20]

The second assault occurred 12 minutes after the first. Appellant struck Mahoney with his shower shoes five to six times and then walked away. The second assault also lasted less than 30 seconds. (P-Ex 148; RT 1030.) After this incident, Mahoney remained sitting on the yard, virtually

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19. The prosecutor did not play the entire edited exhibit for the jury in court, but instead fast-forwarded through parts he deemed unimportant. (5RT 1026.) The jury saw the first five minutes of the tape, and it was then forwarded until just before the first physical contact between appellant and Mahoney (5RT 1028), which occurred approximately 54 minutes and 14 seconds into the tape. (P-Ex 148.)

20. The tape was fast forwarded for the jury, until just before the second assault. The jury thus did not see how much time passed between the two incidents, nor did it see appellant walking right towards the gunner between the assaults. (5RT 1030.)

motionless. Appellant continued to walk up and down the length of the yard, stopping occasionally near Mahoney, talking to him, and then walking back towards the gunner's station. He walked back and forth for over 25 minutes, periodically looking up towards the gunner's window and the camera. (P-Ex 148; RT 1030.)[21]

The third and final assault occurred over 25 minutes later. Appellant walked behind Mahoney and attempted to choke him. Mahoney appeared to struggle for several minutes, and then no movement can be seen on the tape for several more minutes. (P-Ex 148; 5RT 1030.) Approximately four minutes after he grabbed Mahoney, appellant ran across the yard and picked up his tee-shirt, which he ripped in two pieces. He tied the first piece around Mahoney, and then the second piece, tightening it with his foot. Appellant then began again to walk up and down the yard, but returned to Mahoney and struck him with his feet. On one trip, appellant lifted Mahoney's head off the ground, let it go, and then resumed his pacing. Ten minutes after the attack, appellant wrapped a tee- shirt under Mahoney's head and appeared to wash his hands. Appellant sat on top of the toilet for a minute or so, and then resumed walking up and down the yard. Each time appellant faced the end of the yard beneath where the gunner was stationed, he looked up for longer periods of time.

Although Montgomery testified that the tape continued for 12-13 minutes after the third assault, this testimony was not accurate. (5RT 1031.) The tape actually continued for over 30 minutes, during which time appellant continued to pace and look for the gunner before he sat down

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21. The tape was again fast-forwarded for the jury, so again it did not see how much time passed between the two incidents, nor did it see appellant walking right towards the gunner between the assaults.

against the wall in the middle of the yard. (P-Ex 148.) The tape stopped just before appellant was taken off the yard. (RT 1031.)

Officer Todd, testified that, at 11:40 a.m., two hours after he first released Mahoney and appellant onto the yard, the alarm went off. (4RT 892; 914) Appellant was taken off the yard first. (4RT 895-897.)

Mahoney was on the yard, laying face down in a pool of blood. (4RT 898-899, 916.) Mahoney did not have a pulse and was not breathing. (4RT 923; 927) An MTA cut off the shirts wrapped around Mahoney's neck and threw them to the side. (4RT 900-901, 923-927.) CPR was not successful. Staff carried Mahoney outside where an ambulance was supposed to be waiting to take him to the onsite prison hospital but the ambulance wasn't working at the time. Instead, Mahoney was loaded into the back of Ford Ranger truck. (4RT 901-903.) Mahoney never spoke, moved or showed signs of life. (4RT 904, 933.)

Forensic pathologist Dollinger conducted the autopsy of Mahoney. Mahoney was 6'1" and weighed 165 lbs. His age was reported to be 39. The cause of death was asphyxia from ligature strangulation by clothing, although the victim also had bruises from blunt force trauma and lacerations on his head and body. He also had internal bruises and a subdural hemorrhage in the back of his head. Blunt force cranial trauma with a subdural hemorrhage was a contributing cause of death. (3RT 668 -688.)

c. Appellant's Taped Statement and "Re-enactment"

Ebner and Alaniz interviewed appellant on July 2, 1999. The tape was played for the jury and a transcript provided. (5RT 1000-1001; P-Ex 144, 9CT 2401-2456, P-Ex 144A.) During the interview, appellant expressed great distrust of officer Alaniz, and all prison staff because of the problems he had at Corcoran. He expected to be killed on the yard.

Appellant wanted to make sure that the prison's videotape of the yard had been safely secured by the District Attorney, i.e. someone other than prison personnel, because it would show the gunner wasn't doing his job and had committed serious negligence at best.

Appellant described committing three separate assaults against Mahoney over more than two hours. The two men were on the yard together for about 45 minutes before the first assault. (9CT 2436.) After Mahoney fell to the ground, appellant kept hitting him because no shots were fired. (9CT 2430.) Appellant walked the length of the yard back and forth 15 to 20 times, looking up at the gunner to see what he would do. (89CT 2405, 2407, 2439). Appellant attacked Mahoney again with his shower shoes, expecting to get shot by the gunner. (9CT 2439-2440.) When still nothing happened to stop him, appellant knew something was wrong. (9CT 2440.) Eventually he put Mahoney in a choke hold and dragged him to the corner. Mahoney fought back. Appellant repeatedly looked up towards the gunner, again expecting to be shot with blocks or a "nine," but nothing happened. (9CT 2414-2415; 2429, 2442.) [22] After Mahoney's body went limp, appellant got up and saw the gunner standing at the window. Still nothing happened so, as he had done with Mendoza, appellant wrapped tee-shirts around Mahoney's neck and knotted them. (9CT 2413, 2416; 2443-2444.) After the second tee shirt was tied, appellant again started walking the length of the yard, looking at the gunner. He saw the gunner look down at him at least once, and expected him to close down the yard, but still nothing happened. He repeated this several

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22. A "nine" was a reference to a .9 mm H & K rifle that the CDC used to use. They didn't use "nines" at the time of the incident, but had replaced them with .223 caliber weapons. (5RT 1032-1033.)

times and thought he saw the gunner look at him with a smirk. He thought Mahoney must be a "chester,[23] who was disliked by the guards. Appellant wrapped a third shirt around Mahoney's head. He lifted the head up to see if he was dead. He walked back up towards the gunner, then turned around and walked back to Mahoney, assaulting him every time. (9CT 2417-2419; 2431.) Appellant used his foot to draw a face on the wall in the victim's blood. (9CT 2454-2455.)

It was long after he began the assault that appellant first saw the gunner looking down at him. The window over Yard 1 in the gunner's booth was not open. (9CT 2441; 2450.) Usually both windows were open and there was a chair positioned between them so the gunner could see both yards. Appellant was surprised because the gunner yelled to Yard 2 to "get down" rather than yelling to appellant on Yard 1. (9CT 2447.) The inmates on Yard 2 yelled that nothing was happening on their yard. He saw another guard looking down at him and then looking to the corner where Mahoney was. Appellant then heard the alarm go off, but only for 30 seconds. (9CT 2431-2432.) The guards seemed very nonchalant, there was no panic. (9CT 2449.) No one gave any orders to appellant and no shots were fired. (9CT 2447-2448.) He sat and waited by the door for about five minutes until they came to get him. During other incidents, the alarm usually sounded continuously until a group of officers arrived to help. This time, only two sergeants, a floor officer and an MTA came. (9CT 2431-2433; 2434; 2449.)

Appellant did not know Mahoney before the incident. (9CT 2425.) Mahoney told him he was a lifer and that he had been caught with a knife at

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23. A "chester" is prison slang for a child molester. (5RT 1039.)

another prison. Because of this appellant felt "he ain't no loss to nobody." (9CT 2428.) Appellant provided several different explanations for his actions: He stated he only wanted a fistfight with Mahoney. He backed away from Mahoney after attacking him the first time with his fists. He never thought he would be able to "do what [he did]" (9CT 2429), or "get that far." (9CT 2438.) He observed the gunner make some kind of gesture that appellant took as "do what you gotta do" and assumed Mahoney was a "chester." (9CT 2405; 2434; 2440.) Appellant knew there were correctional officers who would "do that." Getting this message, he attacked Mahoney again. (9CT 2405; 2435.)

Appellant also stated:"I snapped when they gave me life for that stupid ass shit a year and a half, a little over a year and half ago. When they gave me three strikes for that shit, I told myself, made a deal with the devil, you give me the opportunity man to pick up each murder for each one those strikes we're cool. So that's, that's that's my pact with the devil man. I already got two, that's my two strikes. I'm gonna earn each and every one of my strikes." (9CT 2422.)

Appellant later claimed that he intended to kill Mahoney when he first went onto the yard. (9CT 2413.) Later still, he said that he thought Mahoney was going to attack him at first. Mahoney was acting very leery of him. (9CT 2425.) He thought some other inmates had "pumped [Mahoney] up" and told Mahoney he had to go on the yard and do something.

Appellant also agreed to "re-enact" the crime on videotape for Ebner. A video of the re-enactment was played for the jury. (5RT 1015; P-

Ex 145, 2CT 504.)[24] Appellant confirmed that he saw the gunner smirk after his first assault on Mahoney, which he took as confirmation that it was okay to continue with the assault. He made clear that his decision to get back at the prison for his third strike had just been formulated. (2CT 521-522.)

4. Appellant's Criminal History

The prosecution offered portions of appellant's section 969(b) packet into evidence to establish two prison priors and serious or violent felony convictions. (4RT 875; P-Ex 88.) The parties also entered a stipulation that appellant was in prison on September 30,1998, October 20, 1998 and on July 2, 1999. (4RT 876.)

5. Defense Evidence

The defense presented no evidence or testimony at the guilt phase of the trial. Appellant did not testify.

B. Prosecution Penalty Phase Evidence

The prosecution presented evidence of multiple separate incidents involving appellant at High Desert and Corcoran State Prisons to establish appellant's commission of unadjudicated criminal activity involving force or violence. The evidence regarding the events on March 8 and March 12-March 13, 1997, November 13, 1999,[25] and March 29, April 15 and April 18, 2000 is summarized in detail in Argument V, *infra*, and will not be

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24. Although the audio was transcribed, the transcript was not provided to the jury as they watched the video. (5RT 1015.)

25. Evidence involving two separate incidents on November 13, 1999, was presented. Facts regarding the cell search conducted on that date are set forth here; facts regarding the alleged assault on inmate Lopez are discussed in full in Argument V, *infra*.

repeated here.

1. Events of December 18, 1997 at High Desert State Prison

Kenton Dewall, a correctional officer at High Desert Prison, testified generally about the incidents that occurred in Susanville in 1997. At that time, if correctional staff felt an extraction was needed, they would first use pepper spray. After the spray, if the inmates still would not comply, staff would do a forced entry into the cell and forcibly remove the occupants. (6RT 1217 -1219.)

Appellant was housed in Dewall's Administrative Segregation Unit for a year. At the time appellant was in Administrative Segregation, he was in the "triple CMS" (CCCMS) program, which is a psychiatric care program. Appellant was prescribed psychotropic medications. When appellant took his medications, he was "very rational." When he was not on medication, he was not rational. (6RT 1258-1259.)

On December 18 1997, appellant and his cellmate, Garcia, were extracted from their cell. (6RT 1267-1269.) Evidence of this incident was presented through the testimony of officers Schmidt and Baires, and a videotape. (6RT 1278-1279; P-Ex B-1.)[26]

Schmidt testified that there were many other extractions being conducted in the same unit on the day of this incident. (6RT 1281-1282.) The inmates were given a chance to cuff up before the extraction and pepper spray was used first. No .37 mm launcher was used. On the videotape, after pepper spray was shot into the cell, the officers can be seen shoving a large metal battering ram through the food port. There was no

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26. A transcript of the audio portion also was prepared. (6RT 1287-1289; 2CT 528; P-Ex B-2.)

testimony regarding the use of this device during this incident. The ram was about five feet long and had a flat horizontal plate at the end that was pushed into the cell. It was pushed in through the port approximately five times, and then more pepper spray was administered through the port. The officers then pulled a sheet out of the cell through the port. (P-Ex B-1.)

Schmidt was the first man in the cell, and carried a curved plexiglas shield. The windows of the cell were covered so he could not see inside. (6RT 1270-1271.) He could hear the inmates in the cell barking and hollering. Schmidt wore a helmet, a knife-proof vest, a towel around his neck, gloves and shin guards. He charged into the cell with adrenaline pumping and hit an inmate with his shield. (6RT 1273.) When they uncovered the lights, Schmidt was on top of appellant with his shield. Schmidt was 6'3, and weighed 210 lbs. (6RT 1277.) Appellant slid his upper body under a bunk and started kicking his feet. Appellant made contact with Schmidt and Schmidt kicked back. (6RT 1274-1275.) Schmidt was wearing boots. They kicked each other for about a minute, and Schmidt yelled for appellant to come out. Other officers were trying to pull appellant out at the same time. It was very crowded. Appellant came out from under the bed and the two men hit each other again. Appellant had nothing in his hands. He was restrained without further incident. (6RT 1281- 1282.) Appellant was the second inmate out of the cell. (6RT 1291.)

2. Incidents at Corcoran State Prison

a. November 13, 1999 Cell Search

On November 13, 1999, appellant's cell at Corcoran State Prison was searched by officer Espinoza. Espinoza found a zylon toothbrush with a sharpened end, in a cubicle under the bunk. The brush was wrapped tightly with newspaper. (6RT 1321-1322; P-Ex D1, D2, D3.) The non-

pointed end was rounded off. The item found in appellant's cell looked like other inmate-made weapons. (6RT 1327-1328.)

b. November 14, 1999 Extraction

Stephen Ny testified that, at 5 p.m. on November 14, 1999, he saw appellant, who was single-celled in Cell 6, throwing his television against the wall and floor. (6RT 1336-1337.) Sergeant White testified that when he reported to Cell 6, the television was in large and small pieces and the circuit boards were scattered. (6RT 1341-1342.)

According to White, appellant was on utensil restriction, which meant he would have to eat with his hands and fingers. Appellant complained that he had no eating utensils. Appellant agreed to cuff up so they could take him out in order to clean up his cell. (6RT 1343-1345.) When White opened the food port, appellant threw a piece of the tv through the port with a flinging motion. (6RT 1346.) Appellant was approximately 3 feet away from the cell door when he threw the plastic piece. (6RT 1362.) It had sharp, broken edges, but it didn't hit anyone. White closed the food port. Appellant did not try to throw anything else.

White returned to Cell 6 a little later and saw that there was paper covering the windows. He tried to talk to appellant, but got no response. White returned again at 7:00 p.m. The windows were still covered and he still got no response from appellant. (6RT 1348-1349.) A six-man extraction team was assembled. The officers all weighed an average of 200 lbs and were between 5'8" and 6 feet tall. (6RT 1350-1351.)

The extraction was videotaped. A redacted version of the tape was played for the jury and a transcript provided. (6RT 1367-1371, P-Ex L-2; 2CT 534; P-Ex L3.) Before the extraction, officers thrust a long ram in through the food port to clear any linens or mattresses that were blocking

their view into the cell. The ram was steel and had a blunt end with handles on it. When they used it, they removed some items from in front of the food port. Appellant remained silent throughout. (6RT 1352.)

The lieutenant next sprayed pepper spray through the port using a hand-held fogger. Then they threw two T-16 pepper spray grenades into the cell. These grenades imploded pepper spray and pushed out a large amount of gas quickly. The T-16's filled the cell up quickly, releasing more gas than other methods. White testified that they tried to communicate with appellant after throwing the first grenade in his cell. He did not respond. They threw another grenade in after four minutes. Appellant still did not respond. (6RT 1353-1355.)

White testified that they planned to use a two-shield team for this extraction. (6RT 1355.) When officers tried to open the cell door, however, it only opened about twelve inches. The extraction team stayed at the cell doorway, blocking it with a shield. Appellant began to throw things and hit or kicked the shield. According to the testimony, officer Godin applied OC pepper spray over the top of the shield with a fogger and appellant snatched for it, brushing the lieutenant's hand. Appellant tried to get out the cell but they restrained his legs and held his arms. He didn't make any effort to strike anyone. (6RT 1357-1360.) On the video, however, officers sprayed more than six long bursts of pepper spray directly into the cell. A mattress eventually was pulled out of the opening. A few minutes later, appellant's legs appeared through the opening and he was either pulled out or squeezed through the narrow opening. He was immediately tackled and pushed down– all six officers piled on top of him. ((P-Ex L-2.)

Officers walked appellant out of the building and decontaminated

him with a garden hose. Appellant was feeling the effects of the OC pepper spray, which caused burning eyes and running nose. (6RT 1376.)[27] They had to spray water from his forehead to his upper torso and face to keep the skin from burning through. Appellant had difficulty breathing. (6RT 1361.)

3. Other Prosecution Evidence

By stipulation, a portion of appellant's section 969(b) package was introduced to show appellant's prior felony convictions. (P-Ex 88A.) The evidence showed appellant was convicted for a violation of Penal Code section 496 (receiving stolen property) in Monterey County in 1986; for a violation of sections 496 and 4502 (possession of a weapon in a penal institution) in Solano County in 1986; and for a violation of section 459 (second degree burglary) in Monterey County in 1990. (P-Ex 88A.)

C. Defense Penalty Phase Evidence

Maggie Velez testified that she is appellant's older sister by 10-11 years. Appellant's family nickname was "Toro." She had eight brothers and sisters. Her siblings have four last names and four different fathers. (7RT 1507-1508.) Their mother never married and other men lived in the house besides the fathers of the children. (7RT 1509.) Their mother died in December, 1991, of kidney problems. Maggie Velez didn't know her father or whether he ever lived in their home. The father of two of her brothers, Robert and Manuel Munoz, lived there. He drank a lot and fought with her mother a lot. (7RT 1510-1511.) Then came appellant's father, Anthony Delgado, Sr. Appellant's father drank a lot, but moved out before

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27. Photographs of appellant and the cell following the extraction were admitted. (P-Ex L4-L13.)

appellant was born. (7RT 1511.)

Their mother started drinking when she was pregnant with Anthony. (7RT 1512.) When appellant was an infant, they lived in Firebaugh (7RT 1517), in a house with just two rooms and a kitchen for nine children and their mother. The bathrooms were outside the house and the only running water in the house was the kitchen sink. They lived there for about two and a half years after appellant was born. (7RT 1513-1514.)

Appellant's mother drank a lot. (7RT 1515.) She didn't care for appellant and didn't hold him. She only fed him when she was sober, which wasn't often. (7RT 1514.) Maggie Velez was eleven when appellant was born. When she came home from school, she would find appellant crying, hungry and soiled. Their mother would be asleep, drunk in bed. (7RT 1514-1515.) Maggie was appellant's caretaker. Her older brothers didn't help her. (7RT 1516.) Their mother neglected appellant. (7RT 1516-1517.)

A couple of years after appellant was born, appellant's mother bought a government funded house, which had four bedrooms and a front and back yard. (7RT 1517.) A man named Jose or Joe Lozano lived there with them. Lozano moved in with them about a month before they moved to the new house. He wasn't violent. This was the most peaceful time in their lives. (7RT 1530.) Her mother still drank, but hid it from Lozano. Maggie Velez cooked and cleaned so that her stepfather wouldn't find out her mother had been drinking because he was the only father they wanted around. Lozano left after several years. (7RT 1518-1519.)

Their mother physically abused appellant in the new house. She hit appellant with her hand and with belts, brooms or whatever she could find. (7RT 1519) She'd slap him in the back of the head if he was walking away,

and if she got a hold of him, she would punch him. (7RT 1533.) Appellant's mother hit him anywhere on his body that he didn't cover up, including on his head. She hit him whenever she could. (7RT 1519.)

Their mother tied appellant up in the closet, so he couldn't get out. (7RT 1519.) The closet had no light in it, and had sliding doors. (7RT 1522.) Maggie Velez often found appellant in the closet when she got home from school. She would untie him, but tell him to stay there. She opened the door a little to give him some air. (7RT 1519-1520.) Sometimes she told him to leave and snuck him out the window. Maggie Velez and her sister Antonia would hide underneath the bed after they had untied appellant or got him out of the room, but their mother would poke the broom to get them out from under the bed. (7RT 1533-1534.) Maggie got in trouble, but not as bad as appellant would when he came back. Their mother hit him or locked him in the closet for a longer time. Their mother put rice on the closet floor and made appellant kneel on it, so it cut into his skin. (7RT 1521.) Appellant never did anything violent to the family. (7RT 1531.)

Their mother treated appellant differently from her other children. She didn't lock the others in the closet. (7RT 1522.) She spanked them but never beat them like appellant. Appellant just let his mother beat him and didn't run away from her. (7RT 1523.) Appellant always tried to please his mother. He'd cuddle up next to her, but she'd push him away. (7RT 1524-1525.)

Sometimes they didn't have enough to eat. When the neighbors gave appellant food to eat, he would bring it home. His mother got upset and said he was out begging for food. She hit appellant and threw everything she could find in the refrigerator into one big bowl. She made him eat it all

as punishment. He was forced to eat it even though he was going to throw up or get sick. (7RT 1523-1524.)

Their mother frequently accused appellant of stealing. Once, she blamed him for stealing $300.00. She beat appellant and locked him in the closet. Two to three months later, Maggie Velez found $300.00 under the dish strainer; it was slimy and moldy. (7RT 1525.)

When appellant was around seven years old, he was removed from his family. Maggie left home around the same time, when she was 17 and came back when she was close to 19. Appellant was gone when she came back home. Appellant had already been taken away once when she was in school, but he came back. Then he went away for good. (7RT 1526.) Appellant stayed with her in Mendota when he was aged 12 or 13. He wasn't violent then and was loving. (7RT 1531.) The last time she saw appellant was in 1992, when he was on parole. Appellant was around 25. He wasn't violent with anyone in her house at the time. (7RT 1532.)

Of Maggie Velez' six brothers, all had been in prison or jail for stealing, drugs, driving under the influence and other things. (7RT 1526-1528.) She saw her brothers Frank and Joe do drugs, and her mother knew about it. (7RT 1529.)

Appellant's cousin, Inocencio Ortega, testified that he grew up with appellant. They are about the same age. Ortega was 13 or 14 the last time he saw appellant. (7RT 1538-1539.) He lived near appellant and spent time at his house. Once, he went to appellant's house to look for him. He could hear appellant in the closet. (7RT 1540-1541.) He didn't know why appellant was put in the closet or who put him there, but appellant's mother was the only one there. She would tell him not to open the closet door. (7RT 1548.) He saw appellant's mother hit him with cords, sticks, or

whatever she could get her hands on. (7RT 1543.) It was frightening. Sometimes appellant's relatives came looking for him, and they hid appellant in their house or backyard because appellant was scared. (7RT 1542.) Ortega didn't see appellant's mother hit any of her other children. (7RT 1543.) She treated appellant differently from the rest. (7RT 1544.)

Appellant's brothers were a lot bigger than Ortega and frightened him very much. He saw them do drugs. He saw appellant's brothers give appellant drugs and glue to sniff. (7RT 1544-1545.) Appellant's brothers laughed when appellant went crazy from the drugs. The brothers were experimenting and it was like a cruel joke they found amusing. (7RT 1546.)

Ortega and appellant played roughly as kids, but it was normal kid play. Appellant never hit him as hard as he could. (7RT 1547.) Sometimes he saw appellant cry when they were playing. There was no reason. He'd just cry. (7RT 1546.)

Yolanda Perez-Logan, a probation officer in Santa Cruz County testified that she had directed a group home for 15 years. She had training in abandonment and other issues for children coming from dysfunctional families. She was a caregiver for abused and neglected chidren. (7RT 1557-1558.) She had cared for several hundred kids. (7RT 1559.)

Appellant was around eleven when he came to live with Perez-Logan. He was very small and had a slight build. He was one of the younger boys in the home. He seemed really fragile and protective of himself. He had scars and marks on his wrists like ligature marks when he arrived. (7RT 1560, 1569.) He was very unkempt. (7RT 1560.)

Appellant had a hard time keeping up his appearance. Abused and neglected children often don't take care of their grooming. Appellant

seemed to have very low self-esteem. He didn't make direct eye contact and looked down a lot. He seemed afraid to show he was afraid. (7RT 1560-1561.)

Appellant was not violent when he lived with Perez-Logan. He sometimes got into fights on the playground, but it was just normal over a ball or something. (7RT 1564, 1567.) He sometimes got frustrated in class because he was at a deficit in his studies.

Perez-Logan testified that appellant sometimes tore up his own property out of frustration, not anger. (7RT 1567.) If he was angry, it was towards himself, as though he was beating himself up. (7RT 1563-1564.) She disciplined appellant at first by yelling and threatening. When that didn't work, she would give him a chance to cool down and work out a punishment. She would give him longer work hours or early bedtime or take away a privilege and add something he needed to do. (7RT 1566.) Appellant was good at chores. (7RT 1567.)

Appellant was one of six children living with Perez-Logan, and he was one of the youngest. They had another eleven year old at the same time as appellant. Appellant and the other boy played together and appellant interacted with him without a lot of negative behavior. (7RT 1562.) The other boy's grandparents' brought him toys but appellant didn't have anyone doing that for him. (7RT 1562.) Most other kids in the home had contact with their families, but not appellant. They got permission to bring him to his mother in Firebaugh for an overnight stay. (7RT 1564.) When they arrived, there were a lot of men standing outside and Perez-Logan was afraid. It was dark inside the house. Appellant was greeted very casually, like he'd just gone out to play. He wanted to stay. She made sure it was safe. That was the only contact that she knew of that appellant had with his

family during the time he lived with her. (7RT 1564-1565.)

Appellant stayed with Perez-Logan's family for approximately a year and a half. He was around 13 when he was removed from her home. (7RT 1563.) He came back to her house once after that when he was still young. (7RT 1568.) Appellant also came to stay with her when he was an adult. Her son was six or seven at the time, and appellant slept in her son's room. She trusted him. (7RT 1568.) He had never been violent to her family and she had never seen him act violent towards others. (7RT 1569.)

Mary Ann Clare, a retired elementary school teacher, testified that appellant was in her fifth-grade class. (7RT 1570-1571, 1575.) When he first enrolled, he had serious academic troubles. (7RT 1571.) Appellant got angry when people challenged him. He was not violent, but was a frightened child trying to protect himself. Clare felt appellant was special. He had a spark and was bright, he had a wonderful sense of humor. He responded well when he was treated with respect (7RT 1572), and he acted respectfully towards Clare. (7RT 1574.) He was always trustworthy to her. (7RT 1572.)

At first, appellant didn't have good social skills. He would sometime push or shove other kids instead of talking things through, but it was all very minor. (7RT 1573.) Clare never saw him do anything violent. (7RT 1576.) Appellant improved over time and became popular with the other kids. Appellant was a good athlete. (7RT 1574.)

The last time she saw appellant was in 1990, after he left her school. They hugged each other and she was glad to see him. He made an impression on her. (7RT 1574, 1576.)

D. Prosecution Penalty Phase Rebuttal

The prosecution put defense attorney Tarter's own investigator,

James Davis, on the stand. He testified that he interviewed Maggie Velez on January 10, 2000, for "a good hour" and that Velez didn't mention to him that appellant's mother hit him on the head with a broomstick. (7RT 1586-1587.)

Prosecution investigator Ebner testified that he attempted to interview Inocencio Ortega on May 8, 2000. They spoke on the phone. He told Ortega he wanted to talk to him about appellant's case. He had been told Ortega was a relative who might testify. (7RT 1589.) He set up at time to talk to him about the case on Wednesday, May 10. (7RT 1588.) Ortega wasn't home on May 10, but after subsequent contacts, he told Ebner he was hesitant to talk to him. Ebner told Ortega he didn't have to talk to him, and then suggested Ortega call "his lawyer" first. Ortega agreed. (7RT 1589-1591.)

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I.

THE JUDICIAL "EXTENSION" OF THE ATTORNEY-CLIENT PRIVILEGE TO INCLUDE STATE CORRECTIONAL OFFICERS PRIOR TO THE APPOINTMENT OF COUNSEL, OUTSIDE APPELLANT'S PRESENCE AND WITHOUT APPELLANT'S CONSENT, VIOLATED APPELLANT'S RIGHT TO COUNSEL, HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF THE PROCEEDINGS AND AT TRIAL, AND REQUIRES REVERSAL

A. Introduction

For nearly 200 years, courts have recognized the necessity and importance of private consultation between attorney and client to effectuate the assistance of counsel.

> The foundation of the attorney-client privilege . . . is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.

(*Greenough v. Gaskell* (Ch. 1833) 39 Eng. Rep. 618, 620-2.)

The confidential nature of attorney-client communications is crucial to our adversarial system. "[T]he fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [Citation.]" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, fn. omitted.) Without an assurance of confidentiality, "open discussion" is chilled. Thus, while an invocation of the privilege can in some instances protect against *disclosure* of private

communication to third parties, the mere specter of that disclosure destroys the foundation of the attorney-client relationship and undermines the right to counsel, to present a defense, to prepare for trial and to fundamental due process.

In this case, before appellant's very first appearance in court and before he was represented by counsel, he was deprived of his right to confidential communications with his prospective attorney. The prosecutor arranged for correctional officers employed by the California Department of Corrections [hereafter the CDC][28] to be present at all pre-trial and trial conferences between appellant and his attorney. Without inquiry into, or even recognition of, appellant's right to unfettered confidential communications with counsel, and based on nothing more than the prosecutor's personal belief that appellant *might* be dangerous, the judge granted the prosecutor's request to "extend" the attorney-client privilege to individuals chosen and employed by the prosecution team itself. Neither the court, the district attorney, nor appellant's prospective counsel had the authority to "extend" the attorney-client privilege to include unwelcome members of the prosecution team and thus, the arrangement approved by the court deprived appellant of his right to confidential communications with counsel.

Without notice to appellant or a knowing and intelligent waiver of appellant's right to private consultation with counsel, and indeed, without any judicial advisement whatsoever, the court removed the core of

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28. The California Department of Corrections [CDC] was redesignated as the California Department of Corrections and Rehabilitation on July 1, 2005. It will be referred to in this brief as the CDC, in accordance with its name at the time of trial.

appellant's attorney-client relationship, rendering the court's subsequent appointment of counsel a hollow ritual. A crucial aspect of the right to counsel was taken away from appellant by the court *in absentia*, and without his knowledge or his consent.

Appellant thereafter went to trial represented by an attorney with whom he had not yet, and would never be able to, speak freely about his defense. Under such circumstances, the appointment of counsel failed to meet the basic requirements of the state right to counsel, and the Sixth Amendment. The elimination of confidential communications with counsel violated appellant's right to due process under the state and federal constitutions, his statutory and constitutional right to be present during all important stages of the proceedings, his right to present a defense and his state and federal constitutional rights to counsel. (U.S. Const., 5th, 6th and 14th Amends.; Cal. Const., Art. I, §§ 1, 7, 15.)

B. Factual Background

On August 6, 1999, the day that appellant was to be arraigned in the municipal court,[29] the two deputy district attorneys assigned to the case, Chris Gularte and R. "Shane" Burns, brought the attorney whom they anticipated would be appointed to represent appellant, Donna Tarter, to meet with the judge in chambers. Gularte and Burns also brought their investigator, Rick Belar, as well as CDC officers Martinez and Kaszap, who had transported appellant to the court from Corcoran State Prison for arraignment that day, to the meeting with the judge. No one thought to

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29. In 2001, after appellant's trial, Kings County consolidated its municipal and superior courts, becoming the last of California's 58 counties to do so. (http://www.courts.ca.gov/documents/sipes_milestones.pdf)

bring him to the meeting.

In chambers, Deputy District Attorney Gularte did all the talking. He told the judge that he believed appellant was dangerous, that he had killed two people and "they" were afraid he would kill again. In order to protect defense counsel from her future client, the prosecution was "willing to stipulate that the attorney/client privilege will extend to the transport officers who are present with Donna Tarter." The transport officers, Martinez and Kaszap, were correctional guards at Corcoran State Prison, where all the crimes and a number of aggravating incidents had occurred and where appellant remained housed during the trial. At the prosecutor's request, all meetings between appellant and his attorney during trial were to be conducted in the close presence of correctional officers.

Gularte indicated that both he and Tarter had spoken to the two officers present that day to advise them not to disclose anything they heard during attorney-client conferences between Tarter and appellant. Despite this, Gularte asked the court to also admonish the officers to keep confidential anything they heard.[30] Tarter agreed. The judge granted the request pursuant to the prosecutor's stipulation. When the judge advised Martinez and Kaszap to try to avoid "casually overhearing" attorney-client conversations, Gularte corrected him. He informed the court that the officers would be present inside the room with appellant and his attorney at all times and thus would be privy to absolutely everything said, well beyond any "casual overhearing." (8/6/99 CCT 15-21.) Tarter requested that the

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30. Gularte also notified the court that other officers besides Martinez and Kaszap would bring appellant to court during the trial and that they too would be included in the extended attorney-client privilege. (8/6/99 CCT 15-21.)

transcript of this hearing be sealed. Her request was granted for reasons that are not apparent. (*Ibid.*) [31]

Following the in camera hearing, and a brief, first meeting with Tarter (8/6/99 CCT 21), appellant was brought into the courtroom for arraignment on the felony complaint. The judge did not advise appellant of the in camera proceedings, the extension of the attorney-client privilege by the prosecutor and appellant's prospective attorney, nor that he had admonished officers Martinez and Kaszap. The judge did not ask appellant to waive or extend the privilege himself. Appellant also was not advised that he would never be able consult with his attorney in private, nor that the correctional officers who took him to court were now a part of the defense team for purposes of the attorney-client privilege. Instead, the judge simply took appellant's plea and appointed Donna Tarter to represent him. (CCT 30.)

When the court inquired about the timing of the preliminary hearing, Tarter reported that she had "tried to speak" with her client "briefly" following the in camera hearing. (CCT 31-32.) Appellant told the court he did not want to waive time for the preliminary hearing because he wanted it "done and over with." (CCT 33.) When the court explained that, without a waiver of time, Tarter would not have time to review the approximately 7,000 pages of discovery the prosecutors had already turned over, appellant responded that he had "nothing to discuss" with Tarter and that he had "no intentions to discuss anything with her." (CCT 34.) Appellant did not agree to waive time and the preliminary hearing was held on October 5, 1999.

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31. Appellant had no knowledge of what had transpired at the in camera hearing until this Court granted his motion to unseal the transcript on May 9, 2012.

Appellant was brought from Corcoran State Prison to court once before the preliminary hearing. (CCT 41-44, 9/21/99.) The individual correctional officers who transported him to court that day were not admonished by the court regarding the confidentiality of any communications between appellant and Tarter.

Appellant was brought to court for the preliminary hearing on October 5, 1999. Again, the individual correctional officers who transported him on that day were not admonished by the court regarding the confidentiality of any communications they heard between appellant and Tarter. (CCT 46.)

Appellant appeared in the superior court for arraignment on October 20, 1999, before a different judge than the judge who had previously approved the "extension" of the attorney-client privilege to the correctional officers. (1RT 1.) Appellant was brought to the court again on December 16, 1999. (1RT 8.) There was no mention of any agreement between the prosecutor and the transport officers to keep confidential any communications they heard between appellant and Tarter on either date, nor did the trial judge admonish the individual officers who brought appellant to court each day.

On December 22, 1999, over four months after his initial court appearance, and after four court appearances during which appellant was not afforded any private discussions with counsel, including the preliminary hearing, the prosecutor gave the trial judge "notice" that the Department of Corrections had requested to have two particular officers admonished by the court. He explained that his office had "informally given transport officers Masters and Close – we've extended the attorney-client privilege to them so they can be present with Ms. Tarter while she is conversing matters about

the case." The Department of Corrections had requested that the court specifically admonish correctional officers Masters and Close not to disclose attorney-client discussions with anyone in the CDC or the D.A.'s office. The prosecutor explained that the request came from Masters and Close's supervisors at the CDC. (1RT14-15.)

Officers Masters and Close were then brought into court, together with appellant. Prosecutor Gularte explained to the officers that there was an agreement between "the Department of Corrections and ourselves, Ms. Tarter," that any communications heard between appellant and Tarter during court proceedings or visits are within the attorney-client privilege. He continued that "we've personally given that privilege to officers Masters and Close so that they may be present during all communications," and requested that the court advise them not disclose the communications to anyone and to only discuss these communications with Tarter. (1RT 17.) The court then admonished Masters and Close, who indicated they understood. (1RT 18.)

On March 30, 2000, the court discussed the jury questionnaires with counsel for the prosecution and the defense. Appellant was not present for this part of the discussion. During the conference, the prosecutor reported that appellant had stated during a pretrial interview that he had received a three-strikes sentence and that, if allowed to get near them, he would kill three people, one for each strike. (1RT 30, 32.) Later in the hearing, the prosecutor and attorney Tarter told the judge that appellant's statements about killing a third person were specifically directed at correctional officers. (1RT 33-34, 54.)

At that same hearing, the court inquired whether the prosecution would request that appellant be restrained in the courtroom. The prosecutor

stated: "We don't have enough to justify [restraints], so no." (1RT 49.) Defense counsel unequivocally told the court that "[appellant's] not going to be a problem." (1RT 54.)

On May 2, 2000, the day before jury selection began, the court inquired about security measures to be used in case there were inmate witnesses.[32] Appellant was not present for this discussion. (1RT 113.) Officer Eric Griem, who was an officer at Corcoran State Prison, where the charged crimes occurred, indicated he was in charge of appellant's security. He informed the court that there would be three uniformed CDC officers present in court at all times, one on either side of appellant at counsel table, and one directly behind him.[33]

C. The Attorney-Client Privilege Could Not Be Extended by Agreement Between the Prosecutor, Prospective Counsel and the Court to Include Employees of the CDC

Confidential communication between attorney and client is defined by state law. Pursuant to the Evidence Code, a confidential communication is

> information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, disclosed the information to no third persons *other than those who are present to further the interest of the client in the consultation*

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32. Although the defense had requested the presence of one inmate witness, that witness was never called to testify.

33. Neither the CDC nor the prosecutors requested that officer Griems be admonished regarding the confidentiality of any attorney-client communications he heard, as they had for Martinez and Kaszap or Masters and Close. Nor was any other officer similarly admonished during the course of the trial, even though there were three officers "circling around" appellant at all times. (5RT 996-997.)

> *or those to whom disclosure is reasonably necessary for the transmission of that information or the accomplishment of the purpose for which the lawyer is consulted* and includes the legal opinion formed and the advice given by the lawyer in the course of that relationship.

(Cal. Evid. Code § 952, italic added.) Third persons who are present "to further the interests of the client" in the consultation "or to whom disclosure is reasonably necessary" include a spouse, parent, business associate, joint client or any other person who may meet with the client and his attorney "in regard to a matter of joint concern." (Cal. Law Revision Com. com. to Evid.Code, § 952.)

California courts have accordingly held that the privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, but only when disclosure of the communication is reasonably necessary to further the interest of the litigant. (*Zurich Am. Ins. Co. v. Superior Court* (2007) 155 Cal. App. 4th 1485 1495-96.) Conversely, involvement of an unnecessary third person in attorney-client communications destroys confidentiality unless such disclosure is "reasonably necessary to further the purpose of the legal consultation." (*Ibid.*, citing *Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758 ,765; *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874.)

The privilege to prevent disclosure of a confidential communication between attorney and client is limited to communications which are in fact "confidential" within the definition of section 952 of the Evidence Code. "But information transmitted between lawyer and client is not 'confidential' within the meaning of section 952 if it has been knowingly disclosed to a

third person whose presence is not required to advance the client's interest." (*In re Jordan* (1979) 7 Cal.3d 930, 940.)

In *Jordan*, this Court found that prison regulations providing that letters sent between an inmate and his attorney could be read by prison staff to insure they did not contain contraband violated the right to confidential attorney-client communications. (*In re Jordan, supra*, 7 Cal.3d 930.) The letters read by mail room guards were not confidential within the meaning of section 952 because the guards' purpose in reading mail was unrelated to the interests of the inmate-client. Because they were not confidential, the inmate could not claim the attorney-client privilege. This was so even though the Director of Corrections had enacted a rule requiring that such communication be kept in strict confidence since "the director is not authorized to rewrite the law of evidence." (*Id.* at p. 940.) As the court in *Jordan* pointed out, the mail room guard could likely be required to testify over the inmate's objection to the contents of lawyer-client letters he had read, because such an objection would be sustained only if the guard's interception and perusal of the letters were wrongful. The guard's reading of the letter was lawful under prison regulations, and thus no privilege attached. (*Ibid.*)

The correctional officers who were selected by the prison and/or the prosecutor in this case to be present during appellant's conferences with counsel were not agents of counsel or her client, but were agents of appellant's adversaries. Unlike a defense investigator, doctor or other expert retained by counsel to assist with the defense, disclosure to Corcoran guards of the communications between appellant and attorney Tarter, and vice-versa, was not reasonably necessary to "further the purpose of the legal consultation." Prospective counsel Tarter accepted the prosecutor's

representation that appellant posed a danger to her without having even met him. There is absolutely nothing in the record to suggest that counsel felt it necessary to take extra measures during her conferences with appellant for her own safety, but even if she did, there were other ways to accomplish this without disclosure of attorney-client communications to third parties. And even if counsel chose to use a body guard, rather than some other method to protect herself, the use of correctional officers rather than some other person(s) was wholly unnecessary to further, and in fact, impeded, appellant's interests.

Because all attorney-client conferences were conducted in the presence of unnecessary third parties, communications between appellant and attorney Tarter were not "confidential" under California law. As this Court has held, the attorney-client privilege is a legislative creation and the courts of this state have no power to expand it or to recognize implied exceptions beyond statutory limits. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206; see also § 911 [no privilege except as provided by statute].) Thus, notwithstanding the court's acceptance of the "extension" of the privilege to correctional officers, and its admonition to some of those officers to keep what they heard confidential, neither the court, the prosecutor, nor prospective counsel had the power to extend the privilege beyond the scope of section 952, and thus, the stipulation was more akin to a "waiver" by unsolicited proxy of appellant's right to confidential communications.

As shown below, the elimination of appellant's right to confidential consultation with counsel was, in essence, a deprivation of his right to counsel itself, in violation of the state and federal constitutions. Moreover, the process by which appellant's rights were taken away did not comport

with constitutional principles of due process or fundamental fairness.

D. The Right to Confidential Attorney-Client Communications is Absolute and Essential to Both the Federal and State Right to Representation by Counsel and Cannot be Abrogated by the Court

> The right of an accused . . . to have an opportunity to consult freely with his counsel without any third person, whose presence is objectionable to the accused, being present to hear what passes between the accused and his counsel, is one of the fundamental rights guaranteed by the American criminal law- a right that no Legislature or court can ignore or violate.

(*Ex parte Rider* (1920) 50 Cal.App. 797, 799.)

For decades, California courts have vigilantly upheld the right to confidential attorney-client communications as an essential element of the right to counsel under the California Constitution, in a variety of settings. Thus, in 1920, the court of appeal held that juvenile offenders charged with felonies have the right to private communications with their attorneys, even in a jail setting. (*Ex parte Rider*, *supra,* 50 Cal.App.797.) The *Rider* court found that the right to counsel guaranteed by section 13, article 1 of the California Constitution was adopted to secure all the benefits flowing from the employment of counsel to conduct the accused's defense, and that those benefits include the right to consult with counsel. Going further, the court held that "[i]t is equally essential to the enjoyment of this constitutional guaranty that the accused should have the right to a *private* consultation with his counsel." (*Id.* at p. 799, italics added.) The court recognized that "'. . . it is the absolute right of parties charged with crime to consult privately with their attorneys, and that it is an illegal abridgment of this right for a sheriff, jailer, or other officer to deny to a defendant the right to consult his attorneys, except in the presence of such officer.'" (*Id.* at p. 800, quoting *State ex rel. Tucker v. Davis* (1913) 9 Okl. Cr. 94, 130 Pac.

962.)

The principles set forth in *Rider* have been reaffirmed repeatedly by the state courts. (See e.g., *Ex parte Snyder* (1923) 62 Cal.App. 697 [failure of the jail to provide facilities where an adult defendant could have private consultation with counsel outside the hearing of other inmates and visitors, violated his constitutional rights]; *Ex parte Qualls* (1943) 58 Cal.App.2d 330, 331 [jail authorities had duty to make reasonable provision for inmates to consult with their counsel outside of the hearing of other persons]; *Ex parte Ochse* (1951) 38 Cal.2d 230, 231 [trial court improperly required defense mental health expert to interview and evaluate the defendant in conjunction with court-appointed experts].) In *Ochse,* this Court held that "[a]dequate legal representation, of course, requires a full disclosure of the facts to counsel, and in order to assure that a client may safely reveal all the facts of his case to his attorney, the law has long recognized the need for secrecy with respect to communications between them." (*Ibid.*, citations omitted.

Restrictions on the ability of a criminal defendant to confer with counsel during trial can so severely impede the right to counsel that any resulting conviction will not withstand constitutional scrutiny. In *People v. Zammora* (1944) 66 Cal.App.2d 166,[34] the defendants were seated in a group at such a distance from defense counsel that, in order to confer with their clients, counsel had to leave counsel table and walk the distance between their locations. (*Id.* at pp. 227, 234.) The trial court also had

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34. The *Zammora* trial arose out of the1942 Sleepy Lagoon murder case and the ensuing "zoot suit" riots. A fictional account of the trial was presented in the stage play and subsequent movie, *Zoot Suit*. (*Aguilar v. Universal City Studios, Inc.* (1985) 174 Cal.App.3d 384, 386)

ordered that counsel not talk to the defendants during court recesses. (*Id.* at p. 227.)

In reversing the convictions in *Zammora*, the appellate court observed that providing the defendants with the opportunity to convey information to their attorneys during the examination of witnesses is "extremely important." Noting that the right to counsel under both the state and federal constitutions includes a right to confer with counsel, and that the right to confer is "at no time more important than during the progress of the trial," (*People v. Zammora*, *supra*, 66 Cal.App.2d at p. 234), the court concluded that "a defendant *shall not* be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon." (*Id.* at pp. 234-235.)

Issues regarding the right to private communications with counsel most frequently arise in cases where attorney-client communications are surreptitiously intercepted by law enforcement, the prosecution or their agents. (See e.g. *Barber v. Municipal Court* (1979) 24 Cal.3d 742; *People v. Ervine* (2009) 47 Cal.4th 745, cert. den. (2010) 131 S.Ct. 96; *People v. Alexander* (2010) 49 Cal.4th 846, cert. den. (2011) 131 S.Ct. 2111.) In that context, this Court has held that the presence of an undercover agent at multiple attorney-client meetings, regardless of the reasons for his presence, or whether he actually disclosed privileged communications, violates the state constitution. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742.)

In *Barber*, an undercover agent had infiltrated an anti-nuclear group, participated in planning and staging a protest, and was arrested with group members. The agent maintained his cover following the arrests, and thus was present during numerous confidential attorney-client conferences

between group members and their attorney. He claimed not to have disclosed any confidences to his superiors at the Sheriff's Department. Just prior to trial, defense counsel learned that one of his "clients" was an undercover agent, and moved to dismiss the charges. The trial court refused, although it did issue an order prohibiting the prosecution from using any evidence obtained from the undercover officer, or its fruits, and prohibiting the rebuttal of any defense evidence unless the prosecution could demonstrate beyond a reasonable doubt that the rebuttal evidence did not come from the officer. Defense counsel sought a petition for a writ of prohibition. (*Barber v. Municipal Court, supra,* 24 Cal.3d 742.) Despite the trial court's attempt to stem the harm caused by the interference with the attorney-client privilege, this Court found the "right to confer *privately* with one's attorney" is a fundamental right guaranteed by American criminal law and that the only effective remedy was the dismissal of the underlying charges. (*Id.* at p. 760.)

The *Barber* court acknowledged that "the right to privacy of communication between an accused and his attorney has consistently been grounded on California law." (*Barber v. Municipal Court, supra,* 24 Cal.3d at p. 755.) As this Court noted, the first California case to expressly recognize that right was decided more than a decade before *Powell v. Alabama* (1932) 287 U.S. 45, made the Sixth Amendment's right to counsel applicable to the states in capital cases. The state court decisions in this area since *Powell* had all relied on California law and did not refer to the federal Constitution. (*Barber v. Municipal Court, supra,* 24 Cal.3d at p. 755.)[35]

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35. In *Barber,* this Court acknowledged that the United States Supreme Court had held that there was no Sixth Amendment violation in a

In discussing whether a remedy short of dismissal would cure the harm, this Court first noted that the harm arose not just from the possibility that confidences would actually be disclosed and used against the defendants at their trial, but also from the chilling impact on the defendants' ability to prepare for their defense once they learned that they had been infiltrated.

> Whether or not the prosecution has directly gained any confidential information which may be subject to suppression, the prosecution in this case has been aided by its agent's conduct. Petitioners have been prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney. . . . This lack of cooperation, which resulted solely from the intrusion by law enforcement officers in the attorney-client relationship, has resulted in counsel's inability to prepare adequately for trial.

(*Barber v. Municipal Court, supra*, 24 Cal.3d at p. 755-756.)

This Court also rejected the trial court's decision to simply exclude all evidence that came out of the privileged communications. In that case,

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case where attorney-client meetings had been attended by a co-defendant who became an informant for the government. (See *Weatherford v. Bursey* (1977) 429 U.S. 545.) *Barber* held *Weatherford* did not apply because the latter case was a civil rights action seeking compensation for the violation of federal constitutional rights, and not a criminal case, the claim in *Weatherford* was predicated on the federal constitution and not California's constitution, and in *Weatherford*, the informant/co-defendant was invited by defense counsel into the meetings for the sole benefit of the defendant. Moreover, the record in *Weatherford* unequivocally showed there was no harm from the informant's presence as he did not pass on any confidences nor did he testify to anything he learned from the defense, the informant's status was not learned until well into the trial, and there was no evidence of a breakdown in attorney-client communications. (*Barber v. Municipal Court, supra,* 24 Cal.3d at p. 755-756.)

the exclusionary remedy was inadequate because, whether or not the prosecution directly gained any confidential information subject to suppression, the defendants were prejudiced in their ability to prepare their defense. Following disclosure of the agent's identity, the defendants no longer felt they could freely and candidly discuss their case with their attorney. (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 756.) This Court found that allowing the defendants "to proceed to trial under these circumstances would be contrary to basic notions of fair play and simple justice." (*Ibid.*)

This Court also recognized that it would be exceedingly difficult for an exclusionary order to be enforced and nearly impossible for the defendants to establish a breach of the order, particularly with regard to more subtle information learned by the government agent. In addition to the difficulty of proving a violation of the order, this Court found that "enforcement of an exclusionary remedy would place an accused in a Catch-22 situation, because in order to protect his confidences, the client would have to permit them to be re-violated." (*Barber v. Municipal Court*, *supra*, 24 Cal.3d at p. 758.) Because a court could not intelligently decide whether the prosecution has met its burden of showing that certain proffered evidence is not a fruit of or tainted by the illegally obtained information without evidence on the record as to what information was illegally obtained, the defendant would have to reveal the confidential information once again, "not only to the trial court, but also to the prosecutor who would thereby learn the defense strategy, if he had not learned it earlier." (*Id.* at p. 758.)

Unlike in *Barber*, the intrusion on the attorney-client relationship here violated both the state *and* federal constitutional rights to counsel.

Unlike in *Barber* and subsequent cases involving informants or eavesdropping, appellant's claim is not based on surreptitious interception of specific privileged communications, but the wholesale evisceration of his right to the counsel.

In *People v. Ervine supra,* 47 Cal.4th at pp. 763-71, this Court held that a violation of the Sixth Amendment predicated on a governmental incursion into the attorney-client privilege could not be established without a showing that confidential information was actually communicated to the prosecution team. In *Ervine*, the crime was investigated and prosecuted by Lassen County agencies, including the Lassen County District Attorney. The confidential communications, however, were intercepted by members of the Sacramento Sheriff's Department while the defendant was in the Sacramento County Jail. (Ibid.) Pursuant to *In re Steele* (2004) 32 Cal.4th 682, 697, "the prosecution team" only includes agencies who participated or assisted in the prosecution or investigation of the case and information obtained by other agencies or law enforcement individuals is not imputed to the prosecutor. Thus, this Court in *Ervine* found that because the Sacramento Sheriff's Department had no role in the investigation or prosecution of the case, it was not a part of the prosecution team and thus there was no showing that the confidential information was communicated to anyone associated with the prosecution. (*People v. Ervine, supra,* 47 Cal.4th at p. 768.)

Steele made clear that the Department of Corrections was not a part of the "prosecution team" in that case because 1) the prosecution's case had nothing to do with petitioner's prison behavior; 2) the charges were committed after the defendant was released from prison; 3) the prosecution case in aggravation consisted entirely of crimes committed before the

defendant was in prison; and 4) prison officials did not investigate or help prosecute any of these crimes. (*In re Steele, supra,* 32 Cal.4th at p. 701.) Here, in contrast, 1) the entire case against appellant had to do with his prison behavior; 2) all the crimes charged occurred on the grounds of Corcoran State Prison while appellant was a prisoner; 3) the prosecution case in aggravation consisted largely of alleged crimes and other incidents that occurred within the walls of Corcoran and High Desert State Prisons; and 4) initial investigation into the crimes and the aggravating incidents were conducted by first responders within the CDC. In addition, unlike in *Steele*, many of the incidents were documented and reported by CDC employees, many of whom were prosecution witnesses, and one of the victims was, like the officers who were present during appellant's meetings with counsel, also employed by the CDC. Thus, in this case the California Department of Corrections plainly was a member of the prosecution team. (See *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1317 [CDC is member of prosecution team to extent it investigated charged crime].)

Because in this case all attorney-client conferences were conducted in the close proximity of CDC employees, there can be no dispute that confidential information was actually communicated to the prosecution team. Further, the record does not establish that there was no realistic possibility of injury to the defendant from the deprivation of his right to confer privately with counsel, and instead, establishes a very real possibility of such injury.

At no time before, during, or after any of the court proceedings against him, was appellant given an opportunity to speak to his attorney in confidence. In court, he could not whisper to his attorney, nor pass her

confidential notes, without also revealing his communications to the correctional officers who were "circling around" him, between appellant and attorney Tarter. (5RT 996-997.) Not only was appellant's attorney-client privilege eviscerated by the forced presence of third parties during what were supposed to be confidential conversations with his attorney, but in this case, the third parties were not merely disinterested courtroom security personnel nor the local police, but officers at Corcoran State Prison. Thus, appellant was compelled to consult with counsel within the earshot of the co-workers, employees and subordinates of the victim of one of the alleged crimes, and of a majority of the witnesses, or not communicate with counsel at all. The chilling effect of this unnecessary and unwarranted arrangement on appellant's ability to assist counsel cannot be doubted. Accordingly, appellant has shown that his right to counsel under the Sixth Amendment and the state constitution was violated at every stage of the attorney-client relationship.

E. The Absolute Ban on Private Consultation with Counsel Deprived Appellant of the Assistance of Counsel During Each and Every Critical Stage of the Proceedings, Requiring Reversal without a Showing of Prejudice

1. The Absolute Ban on Private Consultation with Counsel is Structural Error under the Sixth Amendment

The United States Supreme Court has held that prejudice need not be shown in cases where the right to counsel was denied, either actually or constructively. Thus, in *Gideon v. Wainwright* (1963) 372 U.S. 335, no defense counsel was appointed at all. In *Geders v. United States* (1976) 425 U.S. 80, the trial court prohibited counsel from consulting with his client during one overnight, mid-trial recess. In *Herring v. New York* (1975) 422 U.S. 853, a state statute allowed the trial judge to prohibit defense counsel

from making a summation. In *Glasser v. United States* (1942) 315 U.S. 60 and in *Holloway v. Arkansas* (1978) 435 U.S. 475, the court required defense counsel to represent defendants with conflicting interests. In all these cases, there either was no counsel provided at all or counsel was prevented from fulfilling his or her normal functions.

In *Geders*, the trial court had ordered all witnesses not to discuss their testimony with anyone. (*Geders v. United States*, *supra*, 425 U.S. at pp. 88-89.) To enforce that ruling, the trial court ordered the defendant "not to discuss your testimony in this case with anyone" and told counsel, "I just think it is better that he not talk to you about anything." (*Id.* at pp. 82-83 & fn.1.) In reviewing the case, the United States Supreme Court held "that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged on his right to the assistance of counsel guaranteed by the Sixth Amendment." (*Geders v. United States*, *supra*, 425 U.S. at p. 91.) The Supreme Court reversed without any inquiry into prejudice, because the defendant had been deprived of his Sixth Amendment right to have "'the guiding hand of counsel at every step in the proceedings against him.'" (*Id.* at p. 89, quoting *Powell v. Alabama* (1932) 287 U.S. 45, 68-69.)

In *Holloway v. Arkansas*, *supra,* 435 U.S.at pp. 489-491, the trial court's order required counsel to represent three codefendants with conflicting interests. The government argued that structural error was reserved for cases involving the complete denial of counsel, but the Supreme Court disagreed: "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee" when the trial court's order has "effectively sealed his lips on crucial matters." (*Id.* at p. 490.) The Court

made clear that reversal was required without a showing of prejudice because the court's unconstitutional order affected the strategic decisions about what evidence to present at trial, pretrial plea negotiations and sentencing. (*Id.* at pp. 490-491.)

More recently, in *United States v. Cronic* (1984) 466 U.S. 648, the Supreme Court reiterated that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (Id. at p. 658.) Thus, the *Cronic* Court noted, "[t]he Court has uniformly, found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (*Id.* at p. 659 fn.25.)

As subsequently explained in *Bell v. Cone,* (2002) 535 U.S. 685, the *Cronic* opinion identified three specific situations where prejudice would be presumed. First, a trial would be presumptively unfair where the accused is denied the presence of counsel at a critical stage of the proceedings. Second, a similar presumption was warranted if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Finally, where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected. (*Id.* at pp. 695-96, citing, inter alia, *United States v. Cronic, supra,* 466 U.S. at 659–662.)

Amongst the type of structural errors identified in *Cronic* and *Bell* as requiring reversal without a showing of prejudice was error that occurs when counsel operates under conditions which likely would preclude even competent counsel from rendering effective assistance, such as when a trial court places significant restrictions on an attorney's consultation with his or

her client. (See, *Bell v. Cone, supra*, 535 U.S. at pp. 695-696, citing *Geders v. United States, supra*, 425 U.S. 80; see also, *Strickland v. Washington* (1984) 466 U.S. 668, 686, also citing *Geders*.)

The restriction on appellant's right to counsel here was different, but actually much greater, than the restriction found to require per se reversal in *Geders*. In *Geders*, the defendant was denied counsel's assistance during a single overnight recess during the trial, while here, appellant was denied that assistance during all pretrial preparation and throughout the entire trial. (*Geders v. United States, supra*, 425 U.S. 80.) As in *Holloway*, "the mere physical presence of an attorney did not fulfill the Sixth Amendment guarantee" (*Holloway v. Arkansas, supra,* at 435 U.S. at p. 490) because the denial of private consultation prevented open communications between counsel and her client, and thus affected strategic decisions at every stage of the trial. Depriving appellant of the opportunity for any private consultation with counsel before and during his trial, a trial at which his very life was at stake, is structural error and requires reversal of appellant's convictions and death sentences.

2. The Absolute Ban on Private Consultation with Counsel was a Miscarriage of Justice under the California Constitution

In *People v. Alexander, supra,* 49 Cal.4th 846, this Court addressed the right to counsel under the Sixth Amendment separately from the right to counsel under the state constitution. There, the appellant alleged that the surreptitious monitoring and recording of a single phone call between the defendant, his mother and a defense investigator by law enforcement violated, inter alia, the Sixth Amendment. The defense in that case was provided copies of the recorded calls before the trial and the trial court held

a hearing at which it was established that no information heard during the call was provided to the prosecution or used by law enforcement in its investigation, and that defendant's mother had relayed the substance of the call to third parties after the call with her son. (*Id.*, at pp. 885-887.) This Court explained that, even if the injury complained of there, surreptitious recording, amounted to a violation of the state constitution, it was governed by the "miscarriage of justice" standard for reversal required by article VI, section 13.[36] Under that section, after establishing error, in order to obtain a reversal the defendant typically must further establish that there is a reasonable probability that he or she would have obtained a more favorable outcome in the guilt phase were it not for the error. (*People v. Alexander*, *supra,* 49 Cal.4th at p. 896, citing *People v. Watson (*1956) 46 Cal.2d 818, 836). However, as noted in *Alexander*, this Court has held that some errors may rise to the level of a miscarriage of justice without regard to the strength of the evidence presented at trial. (*Ibid.*) Unlike in *Alexander*, the error here did result in a miscarriage of justice.

The kinds of errors that, regardless of the evidence, may result in a miscarriage of justice are those errors that operate to deny a criminal

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36. Article VI, section 13 of the California Constitution provides:

> No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(*Ibid.*)

defendant the constitutionally required orderly legal procedure, i.e. a fair trial. (*People v. Cahill* (1993) 5 Cal.4th 478, 493.) Thus, this Court recognizes that per se reversal is required for fundamental "structural defects" in the judicial proceedings, analogous to those to which the United States Supreme Court referred in *Arizona v. Fulminante,* (1991) 499 U.S. 279, such as the denial of the defendant's right to counsel, to a jury trial or to an impartial trial judge. Structural defects have also been found by this Court after the improper denial of the right to separate counsel, (*People v. Douglas* (1964) 61 Cal.2d 430, 436-439); denial of the right to conflict-free counsel, (*People v. Mroczko* (1983) 35 Cal.3d 86, 104-105, 197); after an ineffectual waiver of the right to a jury trial, (*People v. Holmes* (1960) 54 Cal.2d 442), or where there was racial discrimination during jury selection, (*People v. Wheeler* (1978) 22 Cal.3d 258, 283.)

In *Alexander,* this Court found that the interception of one privileged conversation between the defendant and his legal team did not constitute structural error under the above-cited cases because it was not "as though defendant was denied counsel," or that, because of the interception of the call, defendant's trial could not "reliably serve its function as a vehicle for determination of guilt or innocence." (*People v. Alexander*, *supra*, 49 Cal.4th at p. 897, quoting *Rose v. Clark* (1986) 478 U.S. 570, 577-578.) But the *Alexander* court left open the question of whether, in some other case, a violation of the right to counsel resulting from government interference with the attorney-client relationship could be considered a miscarriage of justice without requiring the defendant to establish a reasonable probability of a more favorable outcome. (*Id.* at p. 896, fn 28.) The present case demonstrates precisely the type of interference that should be deemed a miscarriage of justice because it served to deprive appellant of

one of the crucial, if not *the most crucial,* bedrock guarantees of the right to counsel, without which the appointment of counsel was a mere formality without any substance. Under these circumstances, this Court should find a miscarriage of justice and reverse appellant's convictions and death sentences.

F. Appellant's Due Process and State Statutory Rights to be Present Were Violated When He Was Not Included at a Conference Where the Prosecutor, His Prospective Attorney and the Court Eliminated His Right to Private Attorney-Client Conversations

In this case, appellant's right to be present was violated, to his extreme prejudice, when he was excluded from the critical conference between his prospective attorney, the two prosecuting attorneys, the lead prosecution investigator, two correctional officers, and the judge who was about to arraign and appoint an attorney to represent appellant. Appellant did not waive his right to be at this conference; it was, in fact, held without his knowledge. The transcript of the conference was ordered sealed immediately after its conclusion and thus was not made available to appellant before, during or after the trial.

A criminal defendant has a right to be present at trial under state statutory (§§ 977, 1043) and constitutional law. (Cal. Const., art. I, section 15).[37] Section 977 provides in relevant part:

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37. Section 15 of Article I of the California Constitution reads:

> The defendant in a criminal cause has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the

> (b)(1) In all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. The accused shall be personally present at all other proceedings unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present. . . .

Thus, a capital defendant may be absent from the courtroom only when he voluntarily waives his rights pursuant to section 977, subdivision (b)(1). (*People v. Jackson* (1996) 13 Cal.4th 1164, 1210.)

This Court has held, however, that the right to be present under the statute is no greater than the right guaranteed by the California Constitution. (*People v. Waidla* (2000) 22 Cal.4th 690, 742.) Under the state constitution, "a defendant's presence is required if it bears a reasonable and substantial relation to his full opportunity to defend against the charges." (*People v. Davis* (2005) 36 Cal.4th 510, 530.)

A criminal defendant also has a right to be present at trial under the Due Process Clause of the Fourteenth Amendment and the state constitution. (*Snyder v. Massachusetts* (1933) 291 U.S. 97, 106-107; *United States v.*

> defendant's counsel.
>
> Persons may not twice be put in jeopardy for the same offense, be compelled in a criminal cause to be a witness against themselves, or be deprived of life, liberty, or property without due process of law.

Gagnon (1985) 470 U.S. 522, 526 .) The defendant's presence is required "at all stages of the trial where his absence might frustrate the fairness of the proceedings." (*Faretta v. California* (1975) 422 U.S. 806, 819 fn. 15, citing *Snyder v. Massachusetts, supra,*) or "at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745; see *People v. Romero* (2008) 79 44 Cal.4th 386.) When no evidence is taken during the proceeding held in the defendant's absence, the right of presence is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. (*United States v. Gagnon, supra*, 470 U.S. at p. 526; *Pointer v. Texas* (1965) 380 U.S. 400, 403.)

A defendant may waive his right to be present, provided such waiver is voluntary, knowing, and intelligent. (*Johnson v. Zerbst*, (1938) 304 U.S. 458, 464.) Every reasonable presumption against the loss of the right to be present must be indulged. (*Illinois v. Allen* (1970) 397 U.S. 337, 343; *Johnson v. Zerbst, supra*, 304 U.S. at p. 464.)

At the conference held in appellant's absence, the court accepted a stipulation between prospective defense counsel, Donna Tarter, and the prosecution, that essentially "waived" appellant's right to private, confidential communications with Tarter before and during the trial. The holding of this conference without appellant's presence violated his right of presence whether that right emanates from state statutes, the state constitution, or the federal constitution.

Under state statutes and the California Constitution, appellant had a right to be present because his presence "bore a reasonable and substantial relation to his full opportunity to defend against the charges." (*People v. Davis, supra*, 36 Cal.4th at p. 530.) In appellant's absence, the court

allowed prospective attorney Tarter and the prosecuting attorneys to stipulate away a crucial aspect of appellant's right to counsel, the right to private and confidential consultation. The stipulation presented to and sanctioned by the court, in appellant's absence and without his knowledge, bore a direct and enormous relation to appellant's full opportunity to defend against the charges because it removed his ability to cooperate with and assist counsel, to obtain counsel's candid advice, to share vital information relevant to the guilt phase defense, and to share sensitive and personal information essential to an adequate penalty phase investigation. Indeed, the result of the proceeding was to strip appellant of his ability to obtain virtually *any* of the benefits that derive from the assistance of counsel.

Appellant's federal and state constitutional rights to be present were similarly violated because appellant's absence "frustrated the fairness" of the proceeding in numerous ways. First, only appellant himself had the right to waive or extend the privilege to others because only appellant was the "holder" of the privilege. (Cal.Evid.Code § 952.) It was thus fundamentally unfair for the court to accept the stipulated agreement by prospective counsel, who did not yet even represent appellant, without appellant's presence and consent.

Second, because appellant was absent, the court did not explain to him the scope or nature of the agreement between his prospective attorney and the prosecution. Thus, the criminal process began without appellant being formally advised of the judicially-sanctioned stipulation that the attorney-client privilege had been extended to his transport officers. Because of this, the stipulation could not in any way ameliorate the chilling effect of the presence of the correctional officers at every meeting between appellant and attorney Tarter.

Third, appellant's absence precluded him from opposing the stipulation or voicing any concern to the court. At the time of the conference, there was no evidence before the court that attorney Tarter was fearful of appellant, nor that she would refuse appointment if the court required her to meet with appellant privately. There was no evidence that appellant posed a threat to counsel. Assuming he was competent to do so, had he been present, appellant could have requested that the court inquire into the need for such a radical invasion of the attorney-client relationship. Since she had not yet been appointed as appellant's counsel, attorney Tarter was not obligated to, nor did she purport to, represent appellant at this conference in any way. Had he been present and competent, appellant could have at least attempted to represent his own interests.

Moreover, appellant could have explained to the court that the crimes occurred on state prison grounds at Corcoran, that one of the victims was a correctional officer employed at Corcoran himself, a majority of the witnesses would be correctional officers from Corcoran State Prison, and thus that he would not be able to confide in counsel in the presence of correctional officers. In appellant's absence, and without counsel, no one informed the court of these details, and appellant's interests were not represented by any one present at the hearing. Had these concerns or any opposition been raised before the court, it might have deemed the presence of the officers not necessary or could have considered alternative, and much less intrusive, means to accomplish its goals. The use of correctional officers to protect counsel at every meeting with her client, assuming protection was even necessary, was the most restrictive and invasive form of protection imaginable under the circumstances. Some form of physical restraint or non-contact conferences would have accomplished the same goal

and not deprived appellant of his right to counsel.

Fourth, and perhaps most importantly, because this conference occurred immediately prior to arraignment and the appointment of Donna Tarter as counsel, appellant had no opportunity to make an informed decision whether to accept the appointment of counsel under the conditions required by the stipulation. If competent, he might well have chosen self-representation in lieu of the "assistance" of an attorney who had already failed to assert his rights to private consultation, who had agreed not only to allow unwanted third parties to invade the core of the attorney-client relationship, but unwanted third parties who were appellant's jailors and co-workers of virtually every witness and one of the victims. But because he was unaware of the conference or its implications, appellant could not consider whether, under the circumstances it would have been better to exercise his right to represent himself than go to trial without the benefit of candid and open communications with counsel.

Given that the conference culminated in the deprivation of appellant's right to private consultation with counsel and in essence, his entire right to counsel, the conference was critical to the outcome of the trial. As shown above, appellant's presence "would have contributed to the fairness of the procedure," (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745) in multiple ways. Accordingly, appellant's constitutional right to be present was violated.

1. Appellant's Exclusion from a Conference Where the Prosecutor, His Prospective Attorney and the Court Eliminated His Right to Private Attorney-Client Conversations Requires Reversal

Whether appellant's absence violated state statute, the state constitution or the Due Process Clause of the United States Constitution, the

violation(s) were structural and were not harmless under any standard of review.

Where a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, whether reversal is required depends on the nature of the proceeding from which he was excluded. While deprivation of the right to be present is generally considered to be a "trial error," subject to harmless error review, the United States Supreme Court has acknowledged that there may be instances where the deprivation of that right "by its very nature, cannot be harmless." (*Rushen v. Spain* (1983) 464 U.S. 114, 119, fn. 2.)[38] The deprivation of appellant's right to be present at the conference here cannot be considered an ordinary "trial error." Moreover, by its nature, it cannot be harmless.

Trial errors are those "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the

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38. To the extent this Court has construed *Rushen v. Spain* to hold that erroneous exclusion of the defendant can never be structural error, see e.g., *People v. Perry* (2006) 38 Cal.4th 302, 312; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357, it has misread controlling precedent. In *Spain*, the Supreme Court noted:

> These rights, as with most constitutional rights, are subject to harmless error analysis, see, *e.g., United States v. Morrison,* 449 U.S. 361, 364-365, 101 S.Ct. 665, 667-668, 66 L.Ed.2d 564 (1981) (right to counsel); *Snyder v. Massachusetts,* 291 U.S. 97, 114-118, 54 S.Ct. 330, 335-336, 78 L.Ed. 674 (1934) (right to presence), *unless the deprivation, by its very nature, cannot be harmless*. See, *e.g., Gideon v. Wainright,* 372 U.S. 335 (1963).

(*Rushen v. Spain, supra*, 464 U.S. at p. 119, fn 2, italics added.)

context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 307-308.) The hearing from which appellant was excluded in this case occurred before the trial, in the municipal court, and did not occur "during the presentation of the case to the jury." Harm cannot be assessed in the context of the evidence of guilt or innocence because the prejudicial impact of the error did not specifically relate to the evidence, but to the fundamental fairness of all pretrial and trial proceedings.

Unlike "trial errors," structural errors are defects that permeate "[t]he entire conduct of the trial from beginning to end" or that "affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *(Id.* at pp. 309-310.) Accordingly, courts have found a violation of the right to be present to be structural error requiring automatic reversal in a number of circumstances. (See e.g., *State v. Lopez* (2004) 271 Conn. 724, 737 [defendant's absence from in-chambers inquiry regarding possible conflict of interest on part of defense counsel was structural error]; *State v. Brown* (2003) 362 N.J.Super. 180, 189 [defendant's absence during readback of testimony to jury, unsupervised by judge, was structural error]; *State v. Bird* (2002) 308 Mont. 75, 83 [defendant's exclusion from in-chambers individual voir dire proceedings was structural error]; *State v. Padilla* (N.M.App. 2000) 129 N.M. 625, 630 [defendant's absence at beginning of trial was structural error]; *State v. Calderon* (2000) 270 Kan. 241, 253 [absence of defendant's interpreter during closing arguments violated defendant's fundamental right to be present at trial and was structural error]; *State v. Garcia-Contreras* (1998) 191 Ariz. 144, 149 [defendant's involuntary absence from entire jury selection was structural

error].)

This case presents the unusual situation where the deprivation, by its very nature, precludes traditional harmless error analysis because it affected the whole framework within which the trial proceeded, "rather than simply an error in the trial process itself." (*Arizona v. Fulminante, supra,* 499 U.S. at p at 310.) Appellant's relationship with attorney Tarter was fundamentally altered and unconstitutionally restricted at the hearing from which he was excluded. The hearing thus affected his very first meeting with counsel, and every subsequent conversation or consultation appellant had with Tarter both before and during the trial itself, in court and out of court, and continued until the day he was sentenced to death.

G. The Court Acted in Excess of its Jurisdiction and Had No Discretion to Extend the Attorney-Client Privilege at the Request of the District Attorney

Both the judge in the municipal court and the trial judge sanctioned the attempted extension of appellant's attorney-client privilege to unnecessary third persons, without appellant's knowledge, waiver or consent. These judicial acts were in excess of the court's jurisdiction and wholly beyond the discretion of the judge.

An act in excess of jurisdiction is an act beyond the court's power as defined by constitutional provision, express statutory declaration or decisional rule developed by the courts and followed under the doctrine of *stare decisis*. (*Abelleira v. District Court of App., Third Dist* (1941) 17 Cal.2d 280, 291.) As stated in *Ex parte Rider*, *supra*, 50 Cal.App. at p. 799, the right of an accused to have an opportunity to consult freely and privately with his counsel is a "fundamental right . . . a right that no Legislature or *court* can ignore or violate." (Italics added.) Despite the powerful pronouncement of this principle, the court in the present case ignored *and*

violated appellant's right to private communications with his attorney by approving a "stipulation" that it had no authority to approve, and that cannot be enforced under the terms of the law. As such, it acted in excess of its jurisdiction.

Because of the lack of jurisdiction, appellant's confidences were not protected from disclosure by the "stipulation" presented to the court. The court had no power or authority to prohibit employees of the CDC from communicating what they had heard to their coworkers or supervisors despite its admonition to several officers during the course of the trial. Had they violated the court's directive and disclosed the statements of appellant or his attorney, or the subject of the attorney-client discussions, appellant was without recourse.

In addition, even if the court had the power to "extend" the attorney-client privilege and to order CDC employees not to disclose privileged communications, an admonition was only given to four correctional officers: Martinez, Kaszap, Masters and Close. Yet the record shows that at least one other officer, Griem, was in charge of courtroom security and he was never so admonished. Masters and Close were the only two officers admonished at the time of trial, while the record shows that *three* officers were surrounding appellant at all times. (See e.g., 3RT 702, 5RT 996-997.) Further, it was unlikely that Masters and Close alone transported appellant every day of the 14 day trial. The court's disregard for appellant's rights, and its failure to assure that all officers who might be privy to attorney-client communications were admonished further deprived appellant of due process.

H. Appointment of an Attorney With Whom Appellant Would Not Be Able to Confer Privately Before or During His Trial Was Not the Appointment of Counsel Required by State and Federal Constitutional Law

Our state constitution and the Sixth Amendment to the federal constitution guarantee the effective assistance of counsel to all persons charged with a criminal offense. (*People v. Douglas, supra*, 61 Cal.2d at p. 434; *Strickland v. Washington, supra*, 466 U.S. 668.) This guarantee requires that the relationship of the defendant and his counsel be safeguarded from interference which may impair the effectiveness of such assistance.

Few aspects of the right to the assistance of counsel have been given more emphasis than the right to confer with counsel. The Sixth Amendment pledge that all persons accused of crimes have the right to be assisted by counsel includes a promise that the accused will have "the guiding hand of counsel at every step in the proceedings against him." (*Powell v. Alabama, supra*, 287 U.S. 45, at p 48-49). The right to counsel thus contemplates effective communication between lawyer and client. (*Murray v. Delo* (8th Cir.1994) 34 F.3d 1367, 1373 ["We do not think Congress had in mind a lawyer who would not communicate with his or her client, or who would file a petition without consultation with or authorization from the client."].) Indeed, interference with the ability of a defendant to consult with counsel during the trial so undercuts counsel's effectiveness that it is considered a total deprivation of the right to counsel. (*Geders v. United States, supra*, 425 U.S. 80.)

The United States Supreme Court has long recognized that the attorney-client privilege is founded "upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily

availed of when free from the consequences or the apprehension of disclosure." (*Hunt v. Blackburn* (1888) 128 U.S. 464, 470.) As the oldest of the privileges for confidential communications known to the common law, the "privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy *depends* upon the lawyer's being fully informed by the client." (*Upjohn Co. v. U.S.* (1981) 449 U.S. 383, 389, italics added; see *Trammel v. United States* (1972) 445 U.S. 40, 51; *Fisher v. United States* (1976) 425 U.S. 391, 403; *Baird v. Koerner* (9th Cir.1960) 279 F.2d 623, 629; *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, 208; *Solin v. O'Melveny & Myers* (2001) 89 Cal.App.4th 451, 456–457.)

Effective assistance of counsel depends on the client's willingness to inform counsel of all relevant information, a condition that can only met if the client is "free from the consequences or the apprehension of disclosure." (*Hunt v. Blackburn, supra,* 128 U.S. at p. 470.) If the client knows that damaging information could readily be obtained by the opposing side following disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice. (*Fisher v. United States, supra,* 425 U.S. at p. 403.) Because nothing is more likely to impair the effectiveness of an attorney than the inability to communicate freely and privately with his client (*Coplon v. United States* (1951 D.C. Cir.) 191 F.2d 749; *In re Bull* (D. Nev. 1954) 123 F.Supp. 389, 391), an attorney who will not consult in private with her client cannot be said to satisfy the requirements of the Sixth Amendment or the California Constitution. (*Ex parte Rider, supra,* 50 Cal.App.797 at p. 799 [private consultation with an attorney is essential to the enjoyment of the state constitutional right to the assistance of counsel]; *Adams v. Carlson* (7th Cir. 1973) 488 F.2d 619 [contact with an attorney "and the opportunity to communicate privately is a

vital ingredient to the effective assistance of counsel and access to the courts."].)

In this case, the appointment of counsel under the condition that she would not meet with her client except in the presence and earshot of third parties, even during the trial itself, was tantamount to a failure to appoint counsel at all. The municipal court judge who initially appointed attorney Tarter did so with the knowledge that appointed counsel would not be able to provide an "essential" element of representation by counsel, and that her representation of appellant would be missing the "vital ingredient" of private communications. The superior court judge who reappointed attorney Tarter after the preliminary hearing learned of the arrangement with the correctional officers shortly after superior court arraignment and five months before trial. Under these circumstances, it is as if appellant went to trial without the assistance of counsel and thus the entirety of the proceedings against him are void.

I. Appellant's Right to Be Present at Trial Under the Sixth Amendment and State Constitution Were Violated When He Was Unable to Confer Privately with Counsel Before or During the Trial

As discussed above, the right to be present at trial stems from several sources. A cardinal principle of our criminal justice system is that "after indictment found, nothing shall be done in the absence of the prisoner." (*Sturgis v. Goldsmith* (9th Cir. 1986) 796 F.2d 1103, 1108, quoting *Lewis v. United States* (1892) 146 U.S. 370, 372.) The federal constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment. (*United States v. Gagnon* (1985) 470 U.S. 522, 526, citing *Illinois v. Allen* (1970) 397 U.S. 337, 338 ["One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be

present in the courtroom at every stage of his trial."].) "Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.'" (*People v. Butler* (2009) 46 Cal.4th 847, 861, quoting *Kentucky v. Stincer*, *supra*, 482 U.S. at pp. 744–745, fn. 17.)

Here, while defendant was physically present during trial, he was unable to assist counsel with cross-examination without disclosing his comments to correctional officers at the same time, and thus, it was no different than if he had been tried *in absentia.* Much like a defendant whose mental condition precludes him from conferring with counsel and assisting in his defense, appellant was unable to confer with counsel regarding witnesses, evidence or trial strategy due to the presence of the correctional officers at counsel table and during breaks in the trial. (See *Drope v. Missouri* (1975) 420 U.S. 162, 171-72 [explaining that common law ban on trial of incompetent or insane person is, in part, a by-product of the ban against trials in absentia because the mentally incompetent defendant, though physically present in the courtroom, cannot assist or confer with counsel and thus is afforded no opportunity to defend himself].)

J. Conclusion

Appellant was stripped of a fundamental, if not the most fundamental, component of the right to counsel, *in absentia* and in a sealed proceeding. Although charged with two capital crimes and facing the death penalty, appellant was no less entitled to confidential communications with counsel than any other defendant charged with homicide in a prison setting. The court could not properly alter the scope of appellant's attorney-client privilege, and even if it could, it certainly could not do so without appellant's

presence and understanding of what was being done and why. Because the "extension" of the attorney-client privilege was neither voluntary nor done with appellant's consent or even knowledge, appellant could not and did not waive his right to meet with counsel in private.

While the inclusion of any third party at attorney-client meetings without appellant's consent and/or a showing that their presence was for appellant's benefit would have violated appellant's right to counsel, the third parties included here were CDC officers, and thus actually members of the prosecution team. Whatever chilling effect the presence of any unwanted third party might have had on any defendant's free and open communication with counsel was increased 100-fold by the fact that the third parties in this case were appellant's very adversaries in the proceedings against him.

For all these reasons, appellant's basic rights, including the right to counsel, to be present at all crucial proceedings, and even to be present at trial were violated. The violations undermined and infected the fairness of every step of the proceedings from arraignment through sentencing, and cannot be measured in terms of trial error. Appellant's convictions and death sentences must be reversed.

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II.

APPELLANT'S MURDER CONVICTIONS ARE LESSER INCLUDED OFFENSES OF HIS CONVICTIONS FOR MURDER BY A LIFE PRISONER, AND THUS MUST BE REVERSED

Appellant was convicted of four separate killings for the deaths of two life prisoners. As a result, the jury was asked to return four death verdicts, even though appellant did not commit four different capital offenses.[39] Because the elements of murder under Penal Code § 187 are included in the elements of murder by a life prisoner under Penal Code §4500, the convictions on the lesser crime of murder must be reversed.

The prosecution in this case chose to charge appellant with both murder under Penal Code § 187, and murder by a life prisoner under Penal Code § 4500, for the killing of Mendoza. It similarly chose to charge appellant with both murder under Penal Code § 187, and murder by a life prisoner under Penal Code § 4500 for the killing of Mahoney. Appellant was thus convicted for four separate unlawful killings, even though he committed only two.

In *People v. Reed*, this Court explained the prohibition against multiple convictions based on "necessarily included offenses." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227, citing *People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Although section 954 authorizes multiple convictions based on the same acts, there is a judicially created exception to this rule. Where a defendant has been convicted of two crimes, and one crime is a

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39. Although the trial court stayed two of the four death sentences pursuant to Penal Code § 654, the return of multiple convictions for the same offense raises different issues than, and is analytically distinct from, the imposition of double punishments for the same offenses. (See *People v. Reed* (2006) 38 Cal.4th 1224.)

lesser included offense of the other, the conviction for the lesser offense must be reversed on appeal. (*Reed, supra,* at p. 1227, citing *People v. Ortega* (1998) 19 Cal.4th 686 [reversing conviction for grand theft as a lesser included offense of robbery]; *People v. Pearson* (1986) 42 Cal.3d 351, 355.)

"'[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former'" (*People v. Reed, supra*, 38 Cal.4th at p. 1227, quoting, *People v. Lopez* (1998) 19 Cal.4th 282, 288.) Although it had been a subject of considerable judicial debate, in *Reed*, this Court squarely held that, for purposes of the ban against multiple convictions, the reviewing court considers only the statutory elements of each offense to decide whether one is necessarily included in the other. (*Reed*, at p. 1229.) Applying the "elements test" to the elements of the two statutes at issue here, appellant's convictions for both murder and fatal assault of each victim cannot stand.

This Court recently applied the principles set forth in *Reed* to Penal Code section 4500 and assault with a deadly weapon other than a firearm under Penal Code § 245 subd. (a)(1), and concluded that assault with a deadly weapon other than a firearm is a lesser included offense of section 4500. (*People v. Milward* (2011) 52 Cal.4th 580.) In *Milward,* the only issue was whether the statutory elements of assault with a deadly weapon other than a firearm were also included in the statutory elements of assault by a life prisoner where the victim *does not* die within a year and a day. In that case, the victim did not die, so there was no occasion to consider the overlap between the crime of murder and the crime of murder by a life prisoner set forth in section 4500. Although not divided into subdivisions, it is clear that section 4500 sets forth two separate offenses, with two different

punishments and separate elements.

The statutory elements of murder are long-established and undisputed. Murder is the unlawful killing of a human being, or fetus, committed with malice aforethought. (Penal Code § 187(a).) The penalties range from 15 years to life with the possibility of parole to a death sentence, depending on the degree of murder and in some cases, the status of the victim. (Penal Code § 189.)

The elements of section 4500 are not so straightforward. The statute reads in pertinent part:

> Every person while undergoing a life sentence, who is sentenced to state prison within this state, and who with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the without the possibility of parole for nine years.

(Cal. Penal Code § 4500.) As observed by the trial court here, the statute is written in the "most peculiar way" and "it makes no sense at all." (5RT 1046-1047.) Without determining whether the causation of death requirement is "an element," a special circumstance, or a special finding, the court and parties agreed that the jury had to be instructed to find that the assault caused the victim's death within a year and a day beyond a reasonable doubt, in language that "mirrored the statute" and the jury was so

instructed in the written instructions. (5RT 1048; 9CT 2543-2344.)[40]

Section 4500's "peculiar" structure is due, in part, to its history. The offense of assault by a life prisoner was first codified in 1901 as former section 246. At that time, the statute stated: "'Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death.'" (*People v. Finley* (1908) 153 Cal. 59, 60–61.) It thus made the death penalty mandatory in all assaults perpetrated by those already sentenced to life. Former section 246 was repealed in 1941 and replaced with section 4500. (Stats.1941, ch. 106, § 15, p. 1124.) The statutory language has been amended several times.[41] Most notably, the statute was amended in 1959 to provide for a lesser penalty than death to be imposed where the victim survived the assault, and in 1978, it was amended to eliminate the mandatory death penalty provision altogether and to provide for an alternative punishment of life without the possibility of parole. (*Graham v. Superior Court* (1978) 98 Cal.App.3d 880, 888.) The latter amendment also added language instructing the sentencing authority to choose between life without parole and death by referring to Penal Code

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40. There is no standard CALJIC instruction or recommended language for the crime of "assault by a life prisoner resulting in death," as the trial court referred to it. (See CALJIC 7.35.)

41. See Penal Code section 4500 (added by Stats. 1973, ch. 719, §13, p. 1301, amended by Stats. 1977, ch. 316, § 21, p. 1264); former section 4500 (added by Stat. 1941, ch. 106, § 15, p. 1124, amended by Stat. 1959, ch. 529, § 1, p. 2497, Stats. 1965, ch. 1904, § 1, p. 4412); former section 246 (added by Stat. 1901, ch. 12, § 1, p. 6, repealed by Stats. 1941, ch. 106, § 16, p. 1132, reenacted as section 4500 by Stats. 1941, ch. 106, § 15, p. 1124.)

sections 190.3 and 190.4. (*Id.*)

Regardless of the form of the statute, it is clear that the essential elements of the capital offense as set forth in the statute are 1) an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury; 2) with malice aforethought; 3) by a life prisoner in a state prison; 4) that causes the death of the victim within a year and a day. (See 3 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000), Crimes Against the Person, § 100 [setting forth elements of the crime of "Murder by Life Prisoner."].) That all parties in the trial court, and the trial judge himself agreed that the standard instruction needed to be modified to include the requirement that the jury find beyond a reasonable doubt that the victim died, as a proximate cause of the assault, within a year and a day, further demonstrates that the death of the victim is an essential element of the offense. (5RT 1048.)

Although there is no CALJIC jury instruction for the capital offense set forth in section 4500, there is a standard instruction for another capital offense that is defined by statute in language very similar to section 4500. Section 219 reads:

> Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of

> parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

(Cal. Penal Code § 219.)

CALJIC 9.97 lists the elements of the offense of train derailing or wrecking. The instruction begins: [Defendant is accused in Counts ___ of have violated section 219 of the penal code a crime [.] [, proximately causing the death of a human being.] (CALJIC 9.97.) After the language of the statute itself is read, the instruction continues: "In order to prove this crime, each of the following *elements* must be proved:" (*Id.* italics added.) The instruction then describes the elements of intent and the specific acts alleged to constitute derailment or wrecking. It concludes with a fourth element, which reads: [4. "The [derailment] [or] [blowing up or derailing] [or] [wrecking] of the passenger, freight, or other train, car or engine caused the death of a human being." (*Id.*) The use notes advise the court to "Delete *element #4* if the case does not involve the death of a human being." (*Id.* italics added.) If causation of death is an element of section 219, then it is also an element of section 4500, which is similarly worded.

To prove a violation of the capital crime set forth in section 4500, the prosecutor must establish, *inter alia*, that the defendant committed an unlawful killing [i.e. the victim died as a proximate cause of an assault with a deadly weapon within a year and day] with malice aforethought. To prove a violation of section 187, the prosecution need only prove that the defendant committed an unlawful killing with malice aforethought. Because the capital crime set forth in section 4500 cannot be committed without also necessarily committing murder, a lesser offense, murder is a lesser included

offense within 4500, and defendant's convictions under both statutes cannot stand. (*People v. Reed, supra*, 38 Cal.4th at p. 1227.)[42]

Murder is a lesser offense than fatal assault by a life prisoner because it carries a lower range of punishments. Punishments for murder itself range from death [for first degree murder] to 15 years to life [for second degree murder]. (Cal. Penal Code § 190.) Indeed, only a special circumstances murder carries a comparable sentencing range of either life without the possibility of parole or the death penalty.

Because murder is a lesser included offense of murder by a life prisoner, appellant's convictions for the murder of Mendoza, and the murder of Mahoney, must be reversed.

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42. Should this Court find that the language of section 4500 is too ambiguous to determine the essential elements, than it must apply the rule of lenity. This Court has "repeatedly stated that when a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*People v. Avery* (2002) 27 Cal. 4th 49, 57 [citations omitted.] This Court has recognized that the "rule of lenity" ensures that criminal statutes will provide fair warning of illegal conduct and the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability. (*Id.*) The rule, as established by this Court, applies where two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable. (*Ibid.* at p. 58, citing 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.)

III.
THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL BECAUSE IT FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT

A. Introduction

"To avoid th[e] constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 876.) Under California law, the "special circumstances" enumerated in section 190.2 "perform the same constitutionally required 'narrowing function' as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) The lying-in-wait special circumstance (§ 190.2, subd. (a)(15)), as interpreted by this Court, violates the Eighth Amendment by failing to narrow the class of persons eligible for the death penalty, and by failing to provide a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)

B. The Lying-in-Wait Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants

Murder "perpetrated by means of . . . "lying-in-wait"" is murder of

the first degree. (§ 189.) A defendant convicted of first-degree murder in California is subject to the death penalty if a special circumstance is found. (See § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he defendant intentionally killed the victim while "lying-in-wait"." (Former § 190.2, subd. (a)(15).) The Court has described the lying-in-wait special circumstance as only "slightly different" from lying-in-wait first-degree murder (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500; *People v. Carpenter* (1997) 15 Cal.4th 312, 388; *People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2), with the special circumstance requiring an intentional murder that occurs during a period "which includes (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage[.]" (*People v. Gutierrez* (1986) 28 Cal.4th 1083, 1148-1149, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.)

1. There Is No Distinction Between the "Lying-in-Wait" Special Circumstance and Premeditated and Deliberate Murder

Although the second element of the lying-in-wait special circumstance – a substantial period of watching and waiting – theoretically could differentiate murder under the lying-in-wait special circumstance from simple premeditated murder, the Court's construction of this prong has precluded such a narrowing function. As this Court has held, "the lying-in-wait special circumstance requires no fixed, quantitative minimum time, but the "lying-in-wait" must continue for long enough to premeditate and deliberate, conceal one's purpose, and wait and watch for an opportune moment to attack." (*People v. Bonilla, supra,* 41 Cal.4th at p. 333, citing

People v. Sims (1993) 5 Cal.4th 405, 433-434.) The victim need not be the object of the "watching" in order for this special circumstance to apply, as a period of "watchful waiting" for the arrival of the victim will satisfy this requirement. (*Sims, supra,* 5 Cal.4th at p. 433.) And, this "watchful waiting" may occur in the knowing presence of the victim (see, e.g., *People v. Morales*, *supra*, 48 Cal.3d at p. 558), or where the defendant reveals his presence to the victim. (See, e.g., *People v. Carpenter, supra,* 15 Cal.4th 312, 388-389.) This Court's expansive conception of "lying-in-wait" "threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder." (*People v. Stevens* (2007) 41 Cal.4th 182, 213 (conc. opn. of Werdegar, J.).) In particular, the Court's holding in *Sims*, that the period of watchful waiting be no more than the time required for premeditation and deliberation, undercutting the requirement that this period be "substantial," resulted in a construction of the special circumstance that renders it indistinguishable from premeditated and deliberate first degree murder. (See *id.* at p. 219 (conc. and dis. opn. of Moreno, J.) & pp. 214-216 (conc. and dis. opn. of Kennard, J.).)

In light of this broad interpretation of the second element of the lying-in-wait special circumstance, only the first and third elements are left to differentiate a first-degree murder under the lying-in-wait special circumstance from other premeditated murders. The Court has, however, also adopted an expansive construction of the first prong of the lying-in-wait special circumstance (concealment of purpose), and its case law has construed the meaning of lying-in-wait to include not only killing in ambush, but also murder in which the killer's purpose was concealed. (*People v.*

Morales, *supra*, 48 Cal.3d at p. 555.) By requiring only a concealment of purpose, rather than physical concealment, the first prong fails to narrow the class of death-eligible premeditated murderers in any significant manner. (See, e.g., *id.* at p. 557 [noting concealment of purpose is characteristic of many "routine" murders].)

As for the final prong (a surprise attack from a position of advantage), it is hard to imagine many premeditated murders preceded by fair warning and carried out from a position disadvantageous to the murderer. As Justice Mosk noted:

> [The lying-in-wait special circumstance] is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim.

(*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J).)[43]

In light of the broad interpretation that the Court has given to the lying-in-wait special circumstance, the class of first-degree murders to whom this special circumstance applies is enormous. (See e.g., Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*

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43. See also Osterman & Heidenreich, *"Lying-in-Wait": A General Circumstance* (1996) 30 U.S.F. L.Rev. 1249, 1274: Most of the time a victim is attacked when vulnerable, is unaware of the killer's intention, and is taken by surprise. How is this substantially different from other types of intentional killings? This question is particularly difficult to answer when one recalls that the actual period of "lying-in-wait" need not include 'watching,' the killing need not occur simultaneously with the "lying-in-wait" phase, and it will not matter if the defendant converses or argues with the victim, or even if there were warnings just prior to the attack."

(1997) 72 N.Y.U. L.Rev.1283, 1320 [the lying-in-wait special circumstance makes most premeditated murders potential death penalty cases].) This special circumstance thereby creates the very risk of "wanton" and "freakish" death sentencing found unconstitutional in *Furman, supra,* 408 U.S. 238.

2. There Is No Difference Between "Lying-in-Wait" Murder and the Lying-in-Wait Special Circumstance

Appellant is aware that this Court has repeatedly rejected the contention that the special circumstance of "lying-in-wait" is unconstitutional because there is no significant distinction between the theory of first degree murder by "lying-in-wait" and the special circumstance of "lying-in-wait," and that the special circumstance therefore fails to meaningfully narrow death eligibility as required by the Eighth Amendment. (See, e.g., *People v. Gutierrez, supra,* 28 Cal.4th at p. 1148 [citations omitted].) Appellant requests that this Court revisit the issue. This Court in *People v. Moon* (2005) 37 Cal.4th 1, 22, relying on its earlier decision in *People v. Carpenter, supra,* 15 Cal.4th 312, noted the "slightly different" requirements of lying-in-wait first degree murder and the lying-in-wait special circumstance. In discussing the difference between the two, the Court has noted that there are two factors that are supposed to differentiate them: (1) the special circumstance requires an intent to kill; and (2) the murder must be done while "lying-in-wait" rather than by means of "lying-in-wait." (See *People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.)

This Court has held that what distinguishes lying-in-wait murder from the special circumstance is that "'[m]urder by means of "lying-in-wait" requires only a wanton and reckless intent to inflict injury likely to cause death[,]" while the special circumstance requires "'an intentional murder'"

that "'take[s] place during the period of concealment and watchful waiting[.]'" (*People v. Gutierrez, supra,* 28 Cal.4th at pp. 1148-1149.) California juries are not, however, instructed that "murder by means of "lying-in-wait" requires only a wanton and reckless intent to inflict injury likely to cause death." Moreover, adding intent to kill as an element of the special circumstance is an illusory distinction. If the other factors for "lying-in-wait" are met, including watchful waiting and concealment of a murderous purpose, it is hard to imagine how the killing can occur without the defendant having an intent to kill.

According to this Court, "lying-in-wait" as a theory of murder is "the functional equivalent of proof of premeditation, deliberation and intent to kill." *(People v. Ruiz* (1988) 44 Cal.3d 589, 614.) Therefore, "a showing of "lying-in-wait" obviates the necessity of separately proving premeditation and deliberation . . . ." (*People v. Gutierrez, supra*, 28 Cal.4th at p. 1149, fn. 10.) However, as pointed out by the dissenting judge in *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 313 (dis. opn. of McDonald, J.):

> If by definition "lying-in-wait" as a theory of murder is the equivalent of an intent to kill, and "lying-in-wait" is defined in the identical manner in the lying-in-wait special circumstance, then both must include the intent to kill and there is no meaningful distinction between them. The statement that lying-in-wait murder requires only implied malice appears incorrect because the concept of "lying-in-wait" is the functional equivalent of the intent to kill.

In addition, California juries instructed on lying-in-wait first degree murder are told the murder must be "immediately preceded by 'lying-in-wait,'"(CALJIC 8.25), thereby indicating, as does the special circumstance,

that there can be no "clear interruption separating the period of "lying-in-wait" from the period during which the killing takes place[.]" (CALJIC No. 8.81.15.) Thus, while this Court may interpret the special circumstance differently than lying-in-wait first degree murder, California juries, and particularly appellant's jury, are not provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See Wade v. Calderon (1994) 29 F.3d 1312, 1321-1322 [failure to adequately guide the jury's discretion regarding the circumstances under which it could find a defendant eligible for death violates the Eighth Amendment]; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444 [death penalty statutes are constitutionally defective where "they create the potential for impermissibly disparate and irrational sentencing [by] encompass[ing] a broad class of death-eligible defendants without providing guidance to the sentencing jury as to how to distinguish among them"].)

Furthermore, the element of immediacy of the killing, the purported distinguishing feature of the special circumstance, has been weakened by cases which have held that the murder need not occur while "lying-in-wait" as long as there is a continuous flow of events after the concealment and watchful waiting end. (See, e.g., *People v. Morales*, 48 Cal.3d at p. 558; *People v. Michaels* (2002) 28 Cal.4th 486, 517.)

In sum, the lying-in-wait special circumstance is not narrower than lying-in-wait murder, and can apply to virtually any intentional first-degree murder. This special circumstance therefore violates the Eighth Amendment's narrowing requirement.

Indeed, although the vast majority of states now have capital punishment statutes, only three states other than California use "lying-in-wait" as a basis for a capital defendant's death eligibility: Colorado, Indiana

and Montana. (See Osterman & Heidenreich, *supra,* 30 U.S.F. L.Rev. at p. 1276.) Notably, the construction of the Indiana provision is considerably narrower than the construction of the California statute, as it requires watching, waiting and concealment, then ambush upon the arrival of the intended victim. (*Thacker v. State* (Ind. 1990) 556 N.E.2d 1315, 1325.) Colorado similarly limits its "lying-in-wait or ambush" aggravating factor to situations where a defendant "conceals himself and waits for an opportune moment to act, such that he takes his victim by surprise." (*People v. Dunlap* (Colo. 1999) 975 P.2d 723, 751.) While there are few cases interpreting the Montana aggravating factor, its scope is necessarily limited by the state law requirement of proportionality review, which prevents imposition of death sentences on less culpable defendants. (See Mont.Code.Ann. § 46-18-310.)[44]

C. The Lying-in-Wait Special Circumstance Fails To Meaningfully Distinguish Death-Eligible Defendants from Those Not Death-Eligible

The Eighth Amendment demands more than mere narrowing of the class of death-eligible murderers. The death-eligibility criteria must provide a meaningful basis for distinguishing between those who receive death and those who do not. For example, a death penalty statute could attempt to achieve the Eighth Amendment narrowing requirement by restricting death eligibility to only those murderers whose victims were between the ages of

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44. It is not surprising that the lying-in-wait special circumstance fails to narrow since it is not clear that it was ever meant to. It became a special circumstance as part of the Briggs Initiative which, according to the ballot proposition arguments, was intended to make the death penalty applicable to all murderers. (See Shatz & Rivkind, *supra*, 72 N.Y.U. L.Rev. at p. 1307.)

20 and 22. However, such an eligibility requirement would be unconstitutional in that it fails to meaningfully distinguish, on the basis of comparative culpability, between those who can be sentenced to death and those who cannot. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech* (1993) 507 U.S. 463, 474; see also *United States v. Cheely*, *supra*, 36 F.3d at p. 1445 ("[n]arrowing is not an end in itself, and not just any narrowing will suffice"].)

The lying-in-wait special circumstance, as interpreted by this Court, fails to provide the requisite meaningful distinction between murderers. There is simply no reason to believe that murders committed by "lying-in-wait" are more deserving of the extreme sanction of death than other premeditated killings. Indeed, members of the Court have long recognized this fundamental flaw of the lying-in-wait special circumstance. (See, e.g., *People v. Stevens, supra,* 41 Cal.4th at p. 213 (conc. opn. of Werdegar, J. ["the concept of "lying-in-wait" threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have merely committed first degree premeditated murder"); *id.* at p. 224-225 (conc. and dis. opn. of Moreno, J. ["the lying-in-wait special circumstance . . . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"]; see also *People v. Morales*, *supra*, 48 Cal.3d at p. 575 (conc. and dis. opn. of Mosk, J.); *People v. Webster, supra,* 54 Cal.3d at pp. 461-462 (conc. and dis. opn. of Mosk, J.); *id.* at p. 466 (conc. and dis. opn. of Broussard, J.); *People v. Ceja*, *supra*, 4 Cal.4th at p. 1147 (conc. opn. of

Kennard, J.); but see *People v. Jurado* (2006) 38 Cal.4th 72, 145-147 (conc. opn. of Kennard, J.).)

It is particularly revealing that, as stated above, almost no other state has included lying-in-wait murder as the type of heinous killing deserving of eligibility for the ultimate sanction of death, a clear indication of the lack of "societal consensus that a murder while "lying-in-wait" is more heinous than an ordinary murder, and thus more deserving of the death penalty." (*People v. Webster* (1991) 54 Cal.3d 411, 467 (conc. and dis. opn. of Broussard, J.).)

The lying-in-wait special circumstances, and the death sentences predicated upon it, must be reversed.

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IV.
GUILT PHASE AND PENALTY PHASE INSTRUCTIONS UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH SENTENCES

At the guilt phase, the trial court instructed the jury with CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.20. (5RT 1082-1083, 1085-1086, 1096-1097; 9CT 2525, 2530, 2532, 2533, 2534, 2556.) At the penalty phase, the parties agreed that the trial court would re-instruct the jury with all general guilt phase instructions, including most of the instructions listed above.[45] Accordingly, the trial court read CALJIC Nos. 2.01, 2.21.2, 2.22, 2.27, and 2.51 again to the jury before they began their penalty phase deliberations. (8RT 1636-1637, 1639-1640; 10CT 2709, 2714, 2716, 2717, 2718.) These instructions violated appellant's right not to be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*In re Winship* (1970) 397 U.S. 358, 364), and thereby deprived appellant of his constitutional rights to due process and trial by jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 7, 15-16; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Victor v. Nebraska* (1994) 511 U.S. 1, 6.) They also violated the fundamental requirement of reliability in a capital case, by relieving the prosecution of its burden to present the full measure of proof at either the guilt or penalty phase. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) Because these instructions violated the federal Constitution in a manner that can never be "harmless," the judgment must be reversed.

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45. The court did not read CALJIC 8.20, defining premeditation at the penalty phase.

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Appellant recognizes that this Court has previously rejected many of these claims. (See, e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crittenden* (1994) 9 Cal.4th 83, 144.) Nevertheless, he raises them here for this Court to reconsider those decisions and in order to preserve the claims for federal review, if necessary.[46]

A. The Instruction on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given CALJIC No. 2.01, addressing the relationship between the reasonable doubt requirement and circumstantial evidence. (5RT 1082-1083, 8RT 1636-1637; 9CT 2525, 10CT 2709 [CALJIC No. 2.01; sufficiency of circumstantial evidence – generally].) This instruction advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (*Id.*) The instruction thus informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty even if they entertained a reasonable doubt as to guilt. The instructions undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process, trial by jury, and a reliable capital trial

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46. In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this Court ruled that "routine" challenges to the state's capital-sentencing statute will be considered "fully presented" for purposes of federal review by a summary description of the claims. This Court has not indicated that repeatedly-rejected challenges to standard guilt phase instructions will also be deemed "fairly presented" by an abbreviated presentation. Accordingly, appellant fully presents those claims here.

(U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)[47]

First, the instruction compelled the jury to find appellant guilty and the special circumstance true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship* (1970) 397 U.S. 358, 364.) The instructions directed the jury to convict appellant based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to be "reasonable." An interpretation that appears reasonable, however, is not the same as the "subjective state of near certitude" required for proof beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instruction improperly required conviction on a degree of proof less than that constitutionally mandated.

Second, the circumstantial evidence instruction required the jury to draw an incriminatory inference when the inference appeared "reasonable." The instructions thus created an impermissible mandatory inference that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted it by producing a reasonable exculpatory interpretation. Mandatory presumptions, even if explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of a crime. (*Francis v. Franklin* (1985) 471 U.S. 307, 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

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47. Although defense counsel did not object to these instructions, the errors are cognizable on appeal because they affect appellant's substantial rights. (§ 1259; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

In *People v. Roder* (1983) 33 Cal.3d 491, 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to its existence. Accordingly, this Court should invalidate the instruction given here, which required the jury to presume all elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless appellant produced a reasonable interpretation of that evidence pointing to his innocence. The jury may have found appellant's defense unreasonable but still have harbored serious questions about the sufficiency of the prosecution's case. Nevertheless, under the erroneous instruction, the jury was required to convict appellant of murder if he "reasonably appeared" guilty of murder, even if the jurors still entertained a reasonable doubt of his guilt. The instruction thus impermissibly suggested that appellant was required to present, at the very least, a "reasonable" defense to the prosecution's case when, in fact, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215.)

For these reasons, there is a reasonable likelihood the jury applied the circumstantial evidence instructions to find appellant guilty on a standard less than the federal Constitution requires. Moreover, as argued in Argument V, *supra*, proof of appellant's guilt of many of the unadjudicated crimes presented in aggravation at the penalty phase was insufficient without the improper consideration of unsupported inferences and circumstantial evidence. Given the circumstances of the case, the instruction wrongfully and prejudicially shifted the burden of proof to appellant at both the guilt and penalty phases of his trial.

B. CALJIC Nos. 2.21.2, 2.22, 2.27, and 8.20 Also Vitiated the Reasonable Doubt Standard

The trial court gave three other standard instructions at both the guilt and penalty phases that magnified the harm arising from the erroneous circumstantial evidence instructions, and that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC Nos. 2.21.2 (witness wilfully false – discrepancies in testimony), 2.22 (weighing conflicting testimony), and 2.27 (sufficiency of testimony of one witness). (5RT 1085-1086, 8RT 1636-1637, 1639-1640; 9CT 2530, 2532, 2533, 2534, 10CT 2709, 2714, 2716-2718.) At the guilt phase, another instruction, CALJIC 8.20 (deliberate and premeditated murder), further violated appellant's constitutional rights. (5RT 1096-1097; 9CT 2556.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. Thus, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, and violated the constitutional prohibition against convicting a capital defendant on any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless, "from all the evidence, [they believed] the probability of truth favors his or her testimony in other particulars." That instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses if their testimony had a "mere probability of truth." (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's

testimony could be accepted based on a "probability" standard is "somewhat suspect"].) The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case must be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable," or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22, regarding the weighing of conflicting testimony, specifically directed the jury to determine each factual issue in the case by deciding which version of the facts was more credible or more convincing, replacing the constitutionally-mandated standard of "proof beyond a reasonable doubt" with one indistinguishable from the lesser "preponderance of the evidence standard."

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact, erroneously suggested that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case, and cannot be required to establish or prove any "fact." (*People v. Serrato* (1973) 9 Cal.3d 753, 766.)

Finally, CALJIC No. 8.20, which defines premeditation and deliberation, misled the jury regarding the prosecution's burden of proof at the guilt phase. The instruction told the jury that the requisite deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation. . . ." In that context, the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, as opposed to raising a reasonable doubt. (See *People v.*

Williams (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean absolutely prevent].)

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard under which the prosecution must prove each necessary fact of each element of each offense "beyond a reasonable doubt." The instructions challenged here violated appellant's constitutional rights to due process, trial by jury, and a reliable capital trial. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17.)

C. The Motive Instruction Also Undermined the Burden of Proof Beyond a Reasonable Doubt at the Guilt and Penalty Phases

At the guilt phase, the trial court instructed the jury with CALJIC No. 2.51, as follows:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty.

(5RT 1086, 9CT 2534.) A virtually identical instruction was provided at the penalty phase, substituting the words "crimes charged" with "the crimes [,] which the District Attorney asserts as an aggravating factor." (8RT 1640; 10CT 2718.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. However, due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra,* 443 U.S. at p. 320 [a "mere modicum"of evidence is not sufficient].) Motive alone does not

meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

CALJIC No. 2.51 is so aberrant that it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning could mislead reasonable juror as to scope of instruction].)

This Court has recognized that differing standards in instructions create erroneous implications. (*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [if a generally applicable instruction is expressly applied to one aspect of a charge but not another, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt, effectively placing the burden on appellant to negate or show an alternative to the motive advanced by the prosecutor.

Moreover, the instruction was misleading as to the probative value of the evidence of motive as to the issues in this case. The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It did not tell the jury that the same evidence could establish a mental state in which appellant did not premeditate, deliberate or harbor malice. (Cf. *People v. Martinez* (1984) 157 Cal.App.3d 660, 669.) Further, at the penalty phase, the prosecutor repeatedly referred to

appellant's purported motives to improperly bolster the lack of substantial evidence of appellant's intent to commit assault or battery. (See e.g. 8RT 1672-1673 ["Now Anthony Delgado has a different purpose in those cell extractions . . . .; the reason he forces those cell extractions is . . ."; "he measures success differently than we do . . . ."; "That's what he wants to do . . . ."] The instruction told the jury to consider motive as a circumstance "tend[ing] to establish the defendant is guilty." It thereby put a thumb on the scales in preference for the prosecution's view of the evidence and for the imposition of the death penalty.

CALJIC No. 2.51 failed to state the applicable law impartially, invited the jury to draw inferences favorable to the prosecution, and lessened the prosecution's burden of proof, depriving appellant of due process, a fair trial, equal protection and a reliable determination of guilt and penalty. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Lindsay v. Normet* (1972) 405 U.S. 56, 77; *Winship, supra,* 397 U.S. at p. 364.)

D. The Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each challenged instruction violated appellant's federal constitutional rights by lessening the prosecution's burden, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [CALJIC Nos. 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [CALJIC Nos. 2.02, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded the instructions must be viewed "as a

whole," and that when so viewed the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and give the defendant the benefit of any reasonable doubt, and that jurors are not misled when they are also instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court characterizes as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, (1991) 53 Cal.3d 334 at p. 386.) The question is whether there is a reasonable likelihood the jury applied the challenged instructions in a way that violates the federal Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood the jury applied the challenged instructions according to their express terms.

Second, this Court's essential finding that the flawed instructions are "saved" by the language of CALJIC No. 2.90 requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity."].)

Furthermore, nothing in the challenged instructions explicitly informed the jurors that those instructions were qualified by the reasonable doubt instruction. It is just as likely the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions that contain their own independent references to the evaluation or sufficiency of particular evidence.

E. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction and the determination of sentencing factors on a standard of proof less than proof beyond a reasonable doubt, their delivery was structural error, which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) Minimally, because the instructions violated appellant's federal constitutional rights, reversal is required unless the prosecution can show the error was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) The prosecution cannot make that showing here. Because these instructions distorted the jury's consideration and use of circumstantial evidence, lessened the prosecution's burden and diluted the reasonable doubt requirement, the reliability of the jury's findings of guilt and the appropriate penalty are undermined. The dilution of the reasonable-doubt requirement by the instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana* (1990) 498 U.S.39, 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, appellant's judgment and death sentences must be reversed in their entirety.

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V.

THE TRIAL COURT ERRONEOUSLY ADMITTED AND ERRONEOUSLY INSTRUCTED ON EVIDENCE PRESENTED IN AGGRAVATION PURSUANT TO PENAL CODE SECTION 190.3 SUBDIVISION (b) AND THE EVIDENCE WAS INSUFFICIENT FOR ANY JUROR TO FIND THAT APPELLANT COMMITTED THE UNCHARGED CRIMES OF FORCE OR VIOLENCE BEYOND A REASONABLE DOUBT

A. Introduction

At the penalty phase, the prosecution presented evidence of ten separate incidents involving appellant. It argued that during each incident appellant committed one or more uncharged acts of force or violence within the meaning of Penal Code section 190.3 subdivision (b) [hereafter "factor (b)"] which could be considered by the jury as aggravating factors to be weighed during its penalty determination. The prosecution argued that the uncharged acts were assaults or batteries, and/or violated the statute criminalizing the possession of sharp instruments by a person in custody.

The sufficiency of the evidence to prove two of the incidents was addressed by the trial court before it allowed the jury to consider them as factors in aggravation. With regard to both these incidents, the trial court erroneously found the evidence sufficient to allow the jury's consideration and abused its discretion in allowing its admission. Even if the trial court's ruling was correct, however, the evidence of these and five of the other ten allegedly aggravating incidents actually presented to the jury was, in fact, insufficient to establish the elements of any of the uncharged offenses beyond a reasonable doubt. Because each individual juror could only properly consider such evidence in determining the penalty if he or she found the elements of each uncharged crime proven beyond a reasonable doubt, even if admissible, none of these incidents could have been

permissibly weighed by the jurors in reaching their penalty verdicts. In addition, the trial court's instructions on the requirements of factor (b) were incomplete and erroneous.

Due to the inadmissibility and/or the insubstantial and insufficient nature of the evidence relied on to support a majority of the unadjudicated crimes, the jury's penalty verdicts were unreliable. The jury's decision to sentence appellant to death was skewed by its consideration of so many invalid and factually insufficient sentencing factors. Accordingly, appellant was denied his state and federal constitutional rights to due process, equal protection, a fair trial, trial by an impartial jury, and a reliable and non-arbitrary determination of penalty. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 6th, 8th & 14th Amends.)

B. General Legal Principles

Penal Code section 190.3 subdivision (b) requires the jury to consider in aggravation "the presence or absence of criminal activity by the defendant other than the crimes for which the defendant has been tried in the present proceedings which involve the use or attempted use of force or violence or the expressed or implied threat to use force or violence." (§ 190.3, factor (b).) Evidence of criminal activity under factor (b) must be limited to conduct that demonstrates the commission of a violation of a penal statute. (*People v. Phillips* (1985) 41 Cal.3d 29, 72 [construing 1977 death penalty statute]; *People v. Boyd* (1985) 38 Cal.3d 762, 776-778; *People v. Belmontes* (1988) 45 Cal.3d 744, 808.) The trial court should not permit the penalty jury to consider an uncharged crime as an aggravating factor unless "'a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Boyd* (1985) 38 Cal.3d 762, 778, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576 [quoting *Jackson v.*

Virginia (1979) 443 U.S. 307, 318-319]; see *People v. Clark* (1992) 3 Cal.4th 41, 156-157.) Even if the evidence is properly admitted, the prosecution must establish each element of the offense beyond a reasonable doubt. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; accord, *People v. Anderson* (2001) 25 Cal.4th 543, 589.)

C. The Trial Court Erred in Admitting Evidence Regarding the March 8, 1997 Extraction at High Desert State Prison and the April 18, 2000 Extraction at Corcoran State Prison

After seeking input from the prosecutor, the trial court *sua sponte* considered whether evidence concerning two incidents offered by the prosecution was admissible to prove that appellant engaged in criminal activity within the meaning of section 190.3, factor (b). The trial court's ruling permitting admission of evidence regarding the March 8, 1997 and April 18, 2000 incidents was erroneous and violated appellant's rights under state and federal law.

Under factor (b), the prosecution may only introduce as aggravating evidence "criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3, subd. (b).) The purpose of factor (b) is to allow evidence of violent criminality to demonstrate the defendant's propensity for violence. (*People v. Balderas* (1985) 41 Cal.3d 144, 202.) Such evidence "assist[s] the sentencer in determining whether he is the type of person who deserves to die." (*People v. Ray* (1996) 13 Cal.4th 313, 349-350). Because of "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination," California law requires that the evidence presented in support of a factor (b) aggravator be proved beyond a reasonable doubt. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) In

considering whether factor (b) evidence should be presented to the jury, the trial court must, as a foundational matter, "determine whether there is substantial evidence to prove each element of the other criminal activity" (*People v. Phillips, supra*, 41 Cal.3d at p. 73, fn. 25.) The trial court's decision whether to admit aggravating evidence is reviewed for abuse of discretion. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 224.)

The admission of factor (b) evidence is subject to two important limitations. First, the alleged "criminal activity" must demonstrate a violation of a section of the Penal Code. (*People v. Phillips*, *supra,* 41 Cal.3d at p. 72 [reversing death verdict in part for the admission of activity that did not constitute crimes]; see also, *People v. Lancaster* (2007) 41 Cal.4th 50, 93-94 [defendant's mere possession of handcuff key in jail was not "criminal activity" that constituted admissible aggravating evidence in penalty trial because it violated no statute].) Second, section 190.3 explicitly prohibits admission of "criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (Pen. Code, § 190.3; *People v. Phillips, supra*, at pp. 69-72 .) As shown below, the prosecution's evidence failed to pass these hurdles and, therefore, the trial court abused its discretion in admitting evidence of the March 8, 1997 and the April 18, 2000 incidents.

The admission of the evidence of appellant's actions before or during these two incidents at the penalty phase was erroneous because the alleged crimes were simple assault and misdemeanor battery, not acts of violent criminality. Because these incidents lacked the use or threat of force or violence required to qualify as factor (b) aggravating evidence their admission to obtain appellant's four death sentences violated the Eighth and

Fourteenth Amendments. The admission and adjudication of this evidence at the penalty phase violated appellant's federal constitutional rights. As a result of these errors, appellant was denied his state and federal constitutional rights to due process, equal protection, a fair trial, trial by an impartial jury, and a reliable and non-arbitrary determination of penalty. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., 6th, 8th & 14th Amends.) Although the incidents themselves were not acts of violent criminality, their admission tainted the death sentence and requires its reversal because the prosecutor used the other-crimes evidence to argue that appellant should be be sentenced to death.

1. Factual and Procedural Background Regarding the March 8 1997 Incident

Sgt. Dewall testified about an incident that occurred on March 8, 1997, while appellant was incarcerated in the Administrative Housing Unit at High Desert State Prison. Following Dewall's testimony, the jury was shown a redacted videotape of a cell extraction.

Dewall testified that on March 8, 1997, appellant was in Administrative Segregation, which provided a higher level of security than the regular prison facilities at High Desert. (6RT 1220.) Appellant was housed with "[Jesse] Frutos," another inmate,[48] in a cell six feet wide by 12 feet long (6RT 1227). The cell contained a stainless steel sink and toilet at the front and two metal bunks welded to the wall. There was also a metal storage cubicle, and a metal desk with an attached chair. (6RT 1231.)

A "tactical cell extraction" was performed on appellant and Frutos

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48. Appellant's cellmate is identified in the reporter's transcript only as "Frutos." The Clerk's Transcript indicates however, that his full name was Jesse Frutos. (1CT 52.)

because they had covered the inside windows of their cell door and refused staff directives to uncover the windows. (6RT 1222.) The coverings prevented staff from seeing through the windows into the cell. (6RT 1223). Staff were required to see the occupants of each cell or "living, breathing flesh" to assure there had been no escapes and also so they knew the occupants were still alive and in good health. (*Ibid.*)

On March 8, Dewall testified, correctional employees asked Frutos and/or appellant to remove the window covering "several, four or five times probably." (6RT 1222.) Dewall testified that after the inmates were asked to remove the coverings, "OC pepper spray" was sprayed into the cell three separate times. Each time, a burst of spray was released for approximately two seconds duration. There was a few minutes between each spray. To the best of Dewall's recollection, Frutos and appellant were asked to cuff-up and leave the cell in between each round of pepper spray and "both individuals declined." (6RT 1223-1224.)

After using the pepper spray to try to force Frutos and appellant to leave the cell, the officers escalated to the next level of force, a .37-millimeter weapon launcher, a device that shoots "less-lethal" ammunition. (6RT 1225.) Dewall testified that on this occasion they used the launcher to shoot circular projectiles made of "real dense, hard rubber" into the cell. (*Ibid.*) Rubber bullets may be used for several purposes: to shoot down any barricades that may have been set up by the inmates to impede entry into the cell; to distract and intimidate the inmates, or to force them further back into the cell and away from the door. When the weapon is discharged into the small space of the cell, the inmates hide under the beds to avoid being shot, making it easier for the staff to enter "without resistive combatants." (6RT 1225.)

On March 8, 1997, six rounds of rubber projectiles were fired into appellant and Frutos' cell with the .37-millimeter launcher. The rounds were fired two at a time, three different times. Dewall explained that he opened the cell door four to six inches to allow two sergeants to discharge the projectile rounds into the cell. After the launcher was discharged multiple times, Frutos and appellant were asked to cuff-up and leave the cell, but, according to Dewall, "they declined." (6RT 1226.) Having found the OC pepper spray, and the use of rubber projectiles "ineffective," staff performed a forced cell extraction. (6RT 1227.)

The extraction team consisted of four officers for each inmate, or a total of eight men. The officers all wore protective helmets, gas masks, stab-proof vests, shin guards, and personal protective equipment consisting of a white suit to prevent contact with bodily fluid. (6RT 1227-1228.)

On direct examination, Dewall testifed about the extraction: "The door was opened. The extraction team was met with the occupants of the cell and were involved in a physical altercation." (6 RT 1228.) After appellant was removed from the cell, his cellmate continued to resist. Appellant was seated outside the cell and was not decontaminated from the effects of the pepper spray until Frutos could be restrained. (6RT 1230.) No weapons or other contraband was found in the cell after appellant and Frutos were forcibly removed. (6RT 1233.)

Immediately after Dewall finished testifying about the March 8 extraction, the trial judge stated that he was prepared to strike his testimony because no evidence had been presented that appellant had assaulted anybody. He inquired if the prosecution was going to be able to establish an assault, and directed them to do so. (6RT 1234.) The prosecutor responded that, when the cell door was opened, appellant ran out. The prosecutor

stated that he believed that even running at a correctional officer would be an assault, but that he didn't believe he needed to show that. Dewall then told the judge that appellant had a mattress and had attempted to charge out of the cell. (6RT 1236.) The judge ruled that Dewall's statement "was sufficient to get the matter before the jury." (6RT 1237.) As will be discussed below, that ruling was erroneous and the evidence should have been stricken.

When the jury reconvened, the prosecutor re-questioned Dewall about the March 8 incident. Dewall testified that, when the cell door was opened, "the defendant had a mattress and he attempted to charge out of the cell to get past the extraction team." Appellant made some unspecified "contact" with an unspecified member of the team. Dewall further testified that inmates in Administrative Segregation are not allowed to leave their cells without being cuffed and if an inmate did so, an officer would have to make contact with him. The prosecutor then stated "we'll leave it at that." (6RT 1237-1238.)

On cross-examination, Dewall testified that, although the cell windows were covered, another way to see into a cell is through the food port. On March 8, the food port in appellant and Frutos' cell was not covered up. (6RT 1250-1251.) He also testified that staff sometimes got inmates to remove the coverings by talking to them and negotiating with them. Generally, they make an attempt to resolve things without a forced extraction. (6RT 1252.) He could not say how long the windows were covered in appellant and Frutos' cell before they began to shoot pepper spray into the cell. (6RT 1253.)

Dewall explained that use of the .37-millimeter launcher was "policy and procedure" at the time, but that it was no longer used. A "less-lethal

weapon" is one that "more likely would not result in death," but use of the launcher still could possibly kill an inmate. (6 RT 1253-1254.) The launcher was not intended to hit an inmate, but to remove any barricades, to disorient and to intimidate the inmates. Each blast or round of the launcher sent five big projectiles into the cell, and staff fired a total of six rounds, or thirty projectiles. (6RT 1255.) When the launcher was fired into appellant and Frutos' cell, appellant attempted get out of the cell, using a mattress. He came over the webbing, which only partially blocked the cell opening, via the top bunk. (6 RT 1256.)

The members of the extraction team also were armed with "short-handled batons," which were 12 to 14 inches long. The batons had strings running through them that were attached to the officers' wrists to ensure they did not lose the batons during the extractions. (6RT 1256.)

Dewall also testified that he was aware that appellant was under psychiatric care in the CCCMS or "Triple CMS" program at the time of the extraction. Appellant was on psychotropic medication. Dewall was informed that sometimes appellant did not take his medication. When appellant took his medication, he was "very rational" and had numerous conversations with Dewall. He was not rational when he was off of his medication. (6RT 1258-1259.)[49]

The prosecution played a videotape of the cell extraction for the jury, and provided it with a transcript of the audio portions. (6RT 1261-1267; P-Ex A-1; 2CT 524, P-Ex A-2.) The video evidence contradicted Dewall's testimony in several ways. The video shows that, after firing several .37-

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49. There was no testimony or evidence that Dewall knew whether or not appellant was medicated at the time of the extraction.

millimeter launcher rounds into the cell, the officers sprayed another substance from a canister, which resembled a pepper spray canister, into the cell. Shortly after that, another round of bullets from the launcher was fired into the cell through the door, which the officers had opened several inches. The door opened a little wider, and the guards immediately fired another round and rushed into the cell, tackling appellant, who appeared to be shielding himself with a mattress. Appellant did not charge out of the cell, but was dragged towards the door by six correctional officers wearing full riot gear. After he was restrained, he was carried out of the cell doorway. Appellant was wearing only boxer shorts and wore no shirt or shoes at the time. (P-Ex A-1.)

2. The Trial Court Erred By Admitting the Evidence of the March 8, 1997 Extraction Because it Lacked the Force or Violence Required By Factor (b)

After hearing only Dewall's testimony regarding the March 8, 1997 incident, the trial court considered *sua sponte* whether that testimony should be stricken because it failed to present evidence of any crime of force or violence. In front of the witness, the trial court stated that the prosecution had not presented any evidence of an assault. (6RT 1234.) The prosecutor responded that, when the cell door was opened, appellant ran out. The prosecutor believed that alone was sufficient to establish an assault. Nonetheless, Dewall then told the judge that appellant had a mattress and had attempted to charge out of the cell. (6RT 1236.) The judge ruled that that testimony was sufficient to put the matter before the jury. (6RT 1237.) This ruling was erroneous and the trial court should have struck Dewall's testimony and admonished the jury that the March 8, 1997 incident should not be considered in aggravation.

a. Evidence that Appellant Attempted to Exit His Cell Holding a Mattress Did Not Establish the Violent Criminality Necessary to Qualify as a Factor (b) Aggravator

At the time the court made its ruling to allow Dewall's testimony to stand, the evidence before it consisted of Dewall's prior testimony to the jury that appellant and his cellmate had been pepper sprayed repeatedly and then fired upon with multiple volleys of dense rubber bullets because they failed to cuff-up and leave their cell when ordered to by staff. In response to the court's inquiry about the sufficiency of the evidence to establish an assault, Dewall added only that appellant had a mattress and had attempted to charge out of the cell. (6RT 1236.) Based on the evidence before it, the trial court could not properly find that there was "substantial evidence" to prove each element of a crime of force or violence and thus the testimony should have been stricken and the jury instructed not to consider it as evidence pursuant to factor (b). (*People v. Phillips, supra*, 41 Cal.3d at p. 73, fn. 25).

The United States Supreme Court has held that "force or violence" under factor (b) is not vague because it is phrased in "conventional and understandable terms," and has a "common-sense core of meaning . . . that criminal juries should be capable of understanding." (*Tuilaepa v. California, supra*, 512 U.S. at p. 975-976; accord, *People v. Dunkle* (2005) 36 Cal.4th 861, 922; *People v. Davis* (1995) 10 Cal.4th 463, 542.) A common definition "of 'force' is 'such a threat or display or physical aggression toward a person as reasonably inspires fear of pain, bodily harm, or death.' (Webster's 3d New Internat. Dict. (2002) p. 887)." (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.) Similarly, "violent" is defined as: "characterized by extreme force . . . marked by abnormally sudden physical activity and intensity." (Webster's 3d New Internat. Dict.

(2002) p. 2554; see also Oxford American Dict. (1980) p. 774 [defining "violent" as "involving great force or strength or intensity"].)

In keeping with these definitions, this Court has recognized that "force or violence" under factor (b) refers to conduct causing, threatening to cause, or likely to cause pain, serious bodily harm, or death. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 392 [threatening arson and throwing burning sheet in trash can inside jail amounted to conduct involving threat of force or violence under factor (b) because of the "physical danger" it posed to the life and limb of other inmates and correctional officers]; *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016 [factor (b) "encompasses only those threats of violent injury that are directed against a person or persons"]; *People v. Mason* (1991) 52 Cal.3d 909, 955 [simple, attempted escape does not involve force or violence or the threat of force or violence, but when escape plan calls for use of gun to subdue guard, its danger to life or limb suffices to qualify under factor (b)].)

The crime of simple assault requires proof beyond a reasonable doubt that 1) "[a] person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person;" 2) "[t]he person committing the act was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and 3) "[a]t the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another." (*People v. Williams* (2001) 26 Cal.4th 779, 788.) Although the statute defining assault criminalizes an attempt "to commit a *violent injury* on the person of another," (Penal Code § 240, emphasis added), "violent injury" is held to include any attempt to use physical force even though that

force entails no pain or bodily harm. (*People v. Bradbury* (1907) 151 Cal. 675; *People v. Flummerfelt* (1957) 153 *People v. Carapeli* (1988) 201 Cal. App. 3d 589, 595, fn. 3.)

The crime of assault, so defined, does not necessarily cause or threaten to cause *serious bodily harm*, or even "violent injury," nor is it likely to do so, because it includes any attempt or threat to apply "physical force," no matter how trivial. Unlike the high court's common-sense understanding of "force or violence" under factor (b) in *Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976, the term "physical force" under section 240 includes all *de minimus* acts of attempted physical contact. Given the technical, legal meaning of "violent injury" under section 240, simple assault in the abstract does not involve a level of force or violence that is dangerous.

This Court, however, does not decide in the abstract whether criminal activity that technically violates a criminal statute qualifies under factor (b). Rather, the question "can *only* be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955, italics added; accord, *People v. Dunkle*, *supra*, 36 Cal.4th at p. 922 ["Whether such a burglary "involves" force or violence, and thus qualifies as an aggravating factor under factor (b), depends on the circumstances of its commission"]; *People v. Rayley* (1992) 2 Cal.4th 870, 908 [lewd act on child only qualifies as crime involving "force or violence" under factor (b) if it involved force or violence under circumstances of its commission].)

Given that the purpose of factor (b) is to help the jury decide whether the defendant's propensity for violence makes him the type of person who deserves to die, an assault should be admissible as other-crimes evidence only when the circumstances of its commission causes, threatens to cause, or

is likely to cause serious bodily harm. On the other hand, when the conduct that constitutes an assault is simply a technical violation of the least adjudicated, i.e. the minimum, elements of the offense that does not cause, and is not likely to cause, serious bodily harm, it should not be admissible as other-crimes evidence. In that case, the technical violation is nothing more than a "trivial incident" that should not "influence a life or death decision." (*People v. Boyd, supra*, Cal.3d at pp. 774, 776.)

Here, the evidence before the judge did not show that appellant's move towards the front of his cell holding a mattress as a shield constituted any possible attempt or threat to cause, serious bodily harm. Indeed, whatever acts might have met the elements of a simple assault were so minimal that the prosecutor did not even elicit them, nor did the witness volunteer them, until expressly told to so do by the trial court. There was no evidence that appellant intended to make any physical contact with guards. His "charging" out of the cell was in response to repeated orders to exit the cell. The mattress appellant held before him was used as a shield against the rubber bullets, not as a weapon, and also prevented harm to the correctional officers by blocking contact with appellant's hands and feet. As such, appellant's movements in attempting to exit his cell on March 8 simply did not have the requisite degree of gravity to justify its use as an aggravating factor to influence the jury's decision to put him to death. As a matter of statutory construction, appellant's conduct did not satisfy the "force or violence" requirement of section 190.3, factor (b), and therefore, the trial court abused its discretion by admitting it.[50]

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50. Even if the evidence before the court was sufficient to present to the jury the question of whether appellant committed a crime of force or violence on April 18, 2000, as appellant argues below, there was

3. Factual and Procedural Background Regarding the April 18, 2000 Incident

The prosecution argued that appellant's actions preceding a cell extraction on April 18, 2000 constituted a battery or possession of a sharp instrument.[51] The judge ruled that that testimony was sufficient to put the matter before the jury. (7RT 1480.) This ruling was erroneous and the trial court should have struck the evidence already presented and admonished the jury that the April 18, 2000 incident should not be considered in aggravation.

On April 18, 2000, appellant was to be moved to a "management cell." A management cell had no bed, but only a cement bunk with a mattress. It may or may not have had a toilet. The inmates got a blanket but sometimes did not get a sheet. They may have gotten some property depending on how long they were there. They were under 24 hour supervision. (7RT 1484-1486.) Lieutenant Gatto informed appellant of the move, and appellant agreed to go, but asked for time to get ready. (7RT 1457-1461.)

Gatto testified that, after returning with the unit staff to place appellant in restraints, appellant refused to move. Gatto remembered appellant saying that he would move, but that he also said "I'm going to go my way." (7RT 1462.) An extraction was authorized. After appellant again refused to submit to restraints and get cuffed up (7RT 1463-1465), Captain Andrews authorized the use of pepper spray.

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insufficient evidence actually presented to the jury for any juror to find the elements of assault beyond a reasonable doubt.

51. The prosecution contended that the incident also violated sections 4502 (a) and 4502 (b) and was an act of vandalism. The trial court, however, found that it could only be used to establish a battery. (See discussion in text, *infra*.)

The evidence regarding the extraction was presented in two forms, through the testimony of Lt. Gatto and by a videotape of the extraction. (7RT 1475-1476, P-Ex H-2.) Gatto testified that he used an MK46 canister to shoot pepper spray into appellant's cell. The canister resembled a metal fire extinguisher and was about 15 and one quarter inches in length, four inches diameter. (7RT 1468, 1471.) The CDC had a policy of using a smaller pepper spray canister, but on this occasion, a larger size was used. Gatto did not know why the larger size was available on this date. (7RT 1468.) The MK46 held the same concentration of pepper spray as smaller canisters, but it held more spray, i.e. 46 ounces. The canister was full and brand new when Gatto sprayed it into appellant's cell. (7RT 1465-1469.)

Gatto had experienced the effects of some kind of pepper spray first-hand when he was in the "correctional officer academy" some 17 years earlier. He had difficulty with just walking through a building where the chemical agent had been released. He experienced shortness of breath and burning eyes. (7RT 1467-1468.)

According to his testimony, Gatto fired a very brief three to five second burst of OC pepper spray through the food port. Gatto testified that, after the first burst, Gatto didn't see any effect on appellant, so he waited another three-five seconds after the first burst, and then applied a second three to five second burst. Appellant grabbed the canister through the food port with his left hand and took it into his cell. (7RT 1469.) There was still approximately 40 oz. of pepper spray in the canister when appellant grabbed it. (7RT 1483.)

The captain closed the food port and got a roll-away plexiglas shield to place in front of the cell. The shield had a port or opening in it. Appellant began striking one of the windows in the cell door with what

appeared to be the butt of the canister. The window began to shatter and pieces of glass fell outward onto the floor of the unit outside the cell. (7RT 1470-1471.) Gatto administered another three to five second burst of pepper spray through the port in the shield into the food port. Appellant attempted to block the food port with a mattress and the officers tried to grab it through the port, to create an opening for the spray to go through. Gatto continued to spray appellant with pepper spray while the staff tried to grab the mattress. Appellant only partially blocked the port and the spray hit him in his mid-body. Gatto again testified that the pepper spray did not appear to have any effect on appellant, so he administered a fourth burst of spray, this time through an opening in the side of the door. He aimed the spray at appellant's mid-section and up to his head. He could not actually see where the spray struck appellant. (7RT 1473.)

Another officer told Gatto that appellant had requested to cuff up, so he ordered appellant to place the canister in the food port and waited. Appellant was gasping, kneeling, and choking. Eventually appellant placed the canister in the port. (7RT 1473-1474.) He did not resist being restrained and complied with their orders. According to Gatto, appellant was affected "quite a lot" by the pepper spray. (7RT 1475.)

After Gatto's testimony and as the prosecution prepared to show the videotape of the April 18 incident to the jury, the trial judge called a recess to inquire of the prosecutor outside the jury's presence. The court asked the prosecution "what category of aggravating circumstance" it was contending the evidence showed. (7RT 1476.) The prosecutor initially argued several grounds for admission: 1) that Gatto's testimony established that appellant had possession of a weapon under section 4502 because the statute listed "tear gas;" 2) that section 4502(b) listed the metal on the canister and the

"plastic spaces in the item" as "weapon stock;" 3) that there would be a vandalism charge and 4) that appellant's act of "pounding" on the cell door was "an express threat of violence." (7RT 1476-1477.)

The trial court rejected all of these explanations. First, it found that pepper spray was not included in section 4502(a)'s list of weapons, although it did include tear gas and tear gas weapons. The prosecutor conceded there was no evidence that defendant possessed tear gas. Second, the court found that section 4502(b), prohibiting the manufacture of weapons by prison inmates, did not discuss weapon stock. The prosecutor then argued that the list of items whose manufacture was prohibited by section 4502(b) included "dirks, daggers, [and]sharp instruments" or any tear gas. He contended that when appellant attempted to break the cell door he made shattered glass, a sharp instrument, and that "OC pepper spray" would "fall within any tear gas." He also pointed to the vandalism charge. (7RT 1477.)

The trial court again found no reference to weapon stock or pepper spray in the list of prohibited items in the statute and asked if the prosecutor was contending the broken glass was a weapon. Accordingly, he allowed the prosecutor to voir dire the witness (who apparently had not been excluded from the courtroom during the discussion) to ask more questions about "a sharp instrument." Gatto then testified that in his experience shattered glass could be used "as part of a weapon." (7RT 1479.) He also stated that, when appellant grabbed the pepper spray canister out of his hand, appellant's hand made contact with his. He recalled "some kind of somewhat feeling of a touch . . . ." (7RT 1479-1480.)

After hearing this testimony, the trial court found only that the touching might constitute a battery, and tentatively allowed the testimony of the witness to stand and the videotape to be played for the jury on that basis

alone. (7RT 1480.) The prosecutor stated he would accept the court's ruling, but that all that was required under section 190.3(b) was any act showing the express or implied use of force. The trial court disagreed, and reminded the prosecutor that there had to be criminal activity as defined by statute. Defense counsel said nothing. (7RT 1481.)

When the jury reconvened, the prosecutor questioned Gatto further. Gatto testified that appellant's hand touched his when appellant grasped the top of the canister. (7RT 1481.) He testified that there were glass "fragments" on the section floor when appellant broke the window. The glass had "the ability to carry a sharp edge" and "glass can be used to assist" in the construction of a weapon. The door was damaged. (7RT 1482.)

The redacted or edited tape was then played for the jury. (RT 1483; P-Ex H-2.) Gatto testified that he had viewed the video and that it was an accurate depiction of what happened on April 18, 2000. (7RT 1475-1476.) The videotape evidence, however, differed from Gatto's testimony on several points. The video showed that during the initial use of pepper spray, when appellant pulled the canister into the cell, Gatto had his finger on the trigger continuously for approximately 15 seconds. The chemical agent in the canister shot out an extremely forceful spray for the entire 15 seconds, without any reduction or let up of force. (P-Ex H2.)

The videotape also showed that when appellant hit the canister against the cell window and it began to break, no pieces of the window fell into the cell. The window only broke on the outside, which faced the open area of the unit and the window on the inside of the cell remained completely intact.[52] Gatto returned to the cell and stood directly in front of

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52. No evidence was presented regarding what type of "glass" this door window was made of, or its construction. However, the evidence

the broken window without any protection or shield, and appeared to try to converse with appellant. Appellant was in the cell, attempting to cover his nose with a piece of cloth before he began to use the mattress to shield himself from the next onslaught of pepper spray. The video also showed that after the officers pulled the mattress away from appellant, Gatto forcefully sprayed appellant through the food port for approximately 25 seconds. Appellant was plainly affected by the chemicals and was doubled over in the cell, coughing. (P-Ex H-2.)

On cross-examination, after the video was shown to the jury, Gatto was asked whether the window was broken all the way through in any place. He answered only that it "shattered and slivered." (7RT 1487.) Gatto also explained that appellant did not try to spray pepper spray on anyone. No guards were injured during the incident. (7RT 1487-1488.)

4. The Trial Court Erred By Admitting Evidence of the April 18, 2000 Extraction Because Appellant's Actions Lacked the Force or Violence Required By Factor (b)

After hearing Gatto's testimony regarding the April 18, 2000, extraction, the trial court asked the prosecution to identify what criminal statutes were violated during the incident. After discussion about various offenses with the prosecutor, Gatto said that when appellant grabbed the pepper spray out of his hand, he had "some kind of somewhat feeling of a touch . . . ." (7RT 1479-1480.) The trial court held the evidence would be

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showed that other windows in the cells at Corcoran were made of "safety glass," which consists of three layers, with a metal mesh in between. (7RT 1411.) Safety glass is "glass that is strengthened by tempering and that when struck breaks into relatively harmless granules rather than jagged pieces." (Webster's 3d New Internat. Dict. (2002) p. 1998.)

admissible only to establish a battery. (7RT 1480.) Based on the evidence before it, the trial court could not properly find that there was "substantial evidence to prove each element of a crime of force or violence within the meaning of factor (b) and thus the testimony already presented should have been stricken and the jury instructed not to consider it. (*People v. Phillips, supra*, 41 Cal.3d at p. 73, fn. 25).

As discussed above, the purpose of factor (b) is to demonstrate the defendant's propensity for violence in order to help the jury determine whether he is the type of person who deserves to die." (*People v. Ray*, *supra,* 13 Cal.4th at pp. 349-350.) When considering the admissibility of evidence of unadjudicated criminal activity, the trial court must determine whether there is substantial evidence to prove each element of the unadjudicated offense. (*People v. Phillips, supra*, 41 Cal.3d at p. 73, fn. 25).

Section 190.3 explicitly prohibits admission of criminal activity which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. (Pen. Code, § 190.3; *People v. Phillips, supra*, at pp. 69-72 .) As shown below, the prosecution's evidence failed to pass this hurdle and, therefore, the trial court abused its discretion in admitting evidence of the April 18, 2000 incident.

a. Evidence That Appellant Touched an Officer's Hand When He Grabbed the Pepper Spray Canister Did Not Establish the Violent Criminality Necessary to Qualify as a Factor (b) Aggravator

The trial court held that the evidence regarding the April 18, 2000 extraction was admissible to show only a battery. (7RT 1480.) Although the prosecutor had argued that appellant had committed other crimes during the incident that would have been admissible under factor (b), it told the court it

would abide by its ruling. (7RT 1480-1481.) At a subsequent conference concerning penalty phase jury instructions, the prosecutor initially requested instructions on both battery and vandalism for the April 18 incident. In discussing the proper charge, the trial court stated: "Pretty clearly there was a battery. It's defined as a harmful or offensive touching of the person or something immediately . . . attached to the person" (7RT 1594.) The prosecutor responded that "just grabbing the canister would amount to a battery." (*Ibid.*) The parties joked that Gatto was apparently offended and astounded too, and tried to hide from the camera. (7RT 1595.) The prosecutor ultimately withdrew its request for a vandalism instruction and stated that it would "just go with the battery." (*Ibid.*) Thus, the record shows that the parties and the trial court understood the alleged battery to have occurred only when appellant seized the pepper spray canister from Gatto and not during anything that occurred following that act.

As set forth above, factor(b) has been upheld as constitutional only because the term "force or violence" has a common-sense core of meaning that criminal juries should be capable of understanding. (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 975-976; accord, *People v. Dunkle, supra,* 36 Cal.4th at p. 922; *People v. Davis*, *supra*, 10 Cal.4th at p. 542.) The terms "force" and "violent" are commonly understood to define acts that inspire fear of pain, bodily harm, or death, or actually cause such pain, bodily harm, or death. Accordingly, this Court has recognized that "force or violence" under factor (b) refers to conduct causing, threatening to cause, or likely to cause pain, serious bodily harm, or death.

Misdemeanor battery does not necessarily cause or threaten to cause serious bodily harm, nor is it likely to do so. Misdemeanor battery is defined as "any willful and unlawful use of force or violence upon the person of

another." (Pen. Code, §§ 242, 4501.5).[53] Unlike the high court's common-sense understanding of "force or violence" under factor (b) in *Tuilaepa v. California, supra*, 512 U.S. at pp. 975-976, the term "force or violence" as used in sections 242 and 4501.5 "has a special legal meaning of a harmful or offensive touching." (*People v. Page* (2004) 123 Cal.App.4th 1466, 1474, fn. 1.) It means nothing more than "the least touching," which "need not be violent or severe." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214, fn. 4.) It need not cause pain or serious bodily harm; it need not even be "[]likely to cause harm" or pain. (*People v. Thornton* (1992) 3 Cal.App.4th 419, 423; accord, *People v. Rocha* (1971) 3 Cal.3d 893, 899-900, fn. 12.)

Thus, as this Court has implicitly recognized, the meaning of the term "force or violence" for battery under section 4501.5 is not synonymous with the meaning of that term under factor (b). (*People v. Davis* (1995) 10 Cal.4th 463, 541-542 [on the facts it was not reasonably likely that jurors erroneously applied the special definition of force or violence in battery context to substitute for the common-sense definition of the same term under factor (b)]); see also *People v. Collins* (1992) 10 Cal.App.4th 690, followed in *People v. Anzalone* (1999) 19 Cal.4th 1074, 1082-1083 [ordinary meaning of "force" and "violence" is different than the special legal meaning of "force or violence" in the battery context; ordinary meaning of violence "carries the connotation of more than a simple touching required for a

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53. In this case, the prosecutor argued and the jury was instructed that the criminal activity alleged regarding this incident was a violation of Penal Code section 4501.5, battery by a state prisoner on a non-confined person, rather than a violation of section 242. (8RT 1649-1650; 10CT 2735.) Nonetheless, the definition of force or violence for purposes of section 4501.5 is identical to that for purposes of general battery, and indeed, the jury in this case was instructed in the definition that applies to all crimes of battery. (CALJIC 16.141, 8RT 1650-1651;10CT 2736.)

battery"].) Given the technical, legal meaning of "force or violence" under section 4501.5, this type of battery in the abstract does not involve the level of force or violence that is dangerous.

As argued above in connection with the March 8, 1997 incident, this Court has held that whether a criminal statute qualifies under factor (b) "can *only* be determined by looking to the facts of the particular case." (*People v. Mason*, *supra*, 52 Cal.3d at p. 955, italics added; accord, *People v. Dunkle*, *supra*, 36 Cal.4th at p. 922; *People v. Rayley, supra,* 2 Cal.4th 870 at p. 908.)

A battery should be admissible as factor (b) evidence only when the circumstances of its commission causes, threatens to cause, or is likely to cause serious bodily harm. But when the conduct that constitutes a battery is simply a technical violation of the least adjudicated or the minimum, elements of the offense, or "the least touching" (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214, fn. 4) that does not cause, and is not likely to cause, serious bodily harm, it should not be admissible as other-crimes evidence. In that case, the technical violation is nothing more than a "trivial incident[] of misconduct and ill temper," that should not "influence a life or death decision." (*People v. Boyd*, *supra*, Cal.3d at pp. 774, 776.)

This Court never has held that a mere, technical battery satisfying only the least adjudicated elements of the statute *alone* is sufficient to influence the choice between life and death under factor (b). Instead, it has upheld the introduction of evidence of batteries that "indisputably" involved the use of 'force,' and 'violence,' and 'threats' of violence under their commonsense connotations. *(People v. Davis*, *supra*, 10 Cal.4th at pp. 541-542.) In *Davis*, the defendant kicked the victim and repeatedly lunged at him with sword, slashed at the victim, cutting his jacket with a knife; and

struck, choked and pushed the victim. (*Ibid.* at p. 542.) In the course of identifying what criminal activity satisfies the force or violence requirement of factor (b), this Court has implicitly found that certain acts, by themselves did *not* involve "force or violence." (See also, *People v. Pinholster* (1992) 1 Cal.4th 865, 961 [act of throwing urine was a "technical battery" and admissible under factor (b) because it was part of a continuous course of criminal activity which included kicking and striking inmates and jail deputies]; *People v. Burgener* (2003) 29 Cal.4th 833, 866 [series of acts in which the defendant threw a mixture of scouring powder and chlorine bleach, as well as water and urine, at jail guards amounted to batteries *and* involved force or violence under factor (b)].)

In contrast to these cases, the evidence here proved only that appellant reached out and barely touched Gatto when he grabbed the pepper spray canister from the officer. As shown below, this was an act of self-defense that caused no harm to a person, beyond Gatto being "offended" and "astounded." Appellant's touching was not dangerous in the abstract, and it was not dangerous under the circumstances of its commission, in that the touch itself caused no serious bodily harm, threatened no serious bodily harm and was not likely to cause serious bodily harm Gatto, who was the victim of the battery. Indeed, Gatto's testimony before the judge was only that he had a recollection of "some kind of somewhat feeling of a touch . . . . . (7RT 1479-1480.)

Any battery appellant committed when taking the pepper spray did not have the requisite degree of gravity to justify its use as an aggravating factor to influence the jury's decision to put appellant to death. As a matter of statutory construction, appellant's conduct did not satisfy the "force or violence" requirement of section 190.3, factor (b), and the trial court abused

its discretion by admitting it.

D. The Admission Of Evidence Regarding the March 8, 1997 and the April 18, 2000 Incidents Violated the Federal Constitution

The admission of the evidence about the mattress-charge incident and the pepper-spray canister incident was not only state law error, but also violated the Sixth, Eighth and Fourteenth Amendments to the federal Constitution.

1. Use of the Invalid Factor (b) Aggravators Unconstitutionally Skewed the Sentence-Selection Process Toward Death

In *Brown* v. *Sanders* (2005) 546 U.S. 212, the United States Supreme Court revisited the question of when a capital-sentencing jury's consideration of an invalid aggravating factor violates the Eighth Amendment. The high court announced a new rule:

> An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

(*Id.* at p. 220.) Accordingly, under California's penalty scheme, when the jury considers an invalid aggravating factor in deciding the sentence, constitutional error ensues "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor." (*Id.* at p. 221.)

Such error occurred here. The legal insufficiency of the March 8, 1997 "assault" and the April 18, 2000 "battery" to establish the force or violence required by factor (b) rendered their use as aggravating factors in

this case invalid. Accordingly, the jury was not entitled to consider these aggravating factors or the evidence introduced to support them in deciding appellant's sentence.

Under *Sanders*, the prosecution's failure to prove the "force or violence" element required for factor (b) resulted in Eighth Amendment error, because the jury could *not* "give aggravating weight to the same facts and circumstances" introduced under factor (b) under any other sentencing factor. Neither of these incidents presented the same facts and circumstances as the charged murders or the battery of Eric Mares, i.e. "the circumstances of the crime(s)" made relevant pursuant to section 190.3, subd. (a). Nor did they present the same facts and circumstances of appellant's prior convictions made relevant pursuant to section 190.3, subd. (c), or any of the other sentencing factors listed in section 190.3. Because the jury could not legitimately have considered anything at all about these two offenses as aggravation in any capacity at the penalty phase, the admission of this factor (b) aggravator skewed the jurors' balancing of aggravating and mitigating factors in favor of death in violation of the Eighth Amendment. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 221.)

2. The Evidence of the March 8, 1997 and April 18, 2000 Incidents Was Constitutionally Irrelevant

The evidence of the March 8, 1997 and April 18, 2000 incidents was constitutionally irrelevant to the jury's decision whether appellant should live or die. Where, as in California, aggravating factors are "standards to guide the making of the choice between the alternative verdicts of death and life imprisonment" (*Walton v. Arizona* (1990) 497 U.S. 693, 648), they must provide a principled basis for doing so. (*Arave v. Creech* (1993) 507 U.S. 463, 474.) Under the Eighth Amendment and the due process clause of the

Fourteenth Amendment, an aggravating factor in a death penalty case must be "particularly relevant to the sentencing decision." (*Gregg v. Georgia* (1976) 428 U.S. 153, 192; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process prohibits death penalty decisions based on "aggravation" that is "totally irrelevant to the sentencing process"].) As a general matter, relevant evidence at the selection phase is limited to that which relates to the defendant's character or the circumstances of his crime. (*Zant v. Stephens*, *supra*, at p. 879.)

However, this broad category of generally relevant evidence is not without limits. (See, e.g., *Dawson v. Delaware* (1992) 503 U.S. 159, 165-167 [although defendant's membership in Aryan Brotherhood prison gang, which entertains "morally reprehensible" white racist beliefs, was suggestive of bad character, it was "totally irrelevant" to capital-sentencing where there was no evidence connecting racist views to the murder]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 433, fn. 16 [although technically a circumstance of the crime, the fact that the murder was accomplished with a shotgun rather than a rifle, which resulted in a "gruesome spectacle," was "constitutionally irrelevant" to the penalty decision]; *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308-1310 [character evidence of non-violent sexual conduct, which included defendant's homosexuality and "abnormal sexual relations," was constitutionally irrelevant to sentencing decision where, for instance, there was no evidence connecting sexual history to charged crime or future dangerousness].) At bottom, to be constitutionally relevant, aggravating evidence must assist the jury in distinguishing "those who deserve capital punishment from those who do not." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474.)

In addition, the constitutional relevance of the factor (b) aggravator

must be assessed in terms of the Eighth Amendment requirement of heightened reliability, which is the keystone in making "the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "[H]eightened reliability controls the quality of the information given to the jury in the sentencing proceeding by assuring that the sentencer receives evidence that, in logic and law, bears on the selection of who, among those eligible for death, should die and who should live." (*United States v. Friend* (E.D. Va. 2000) 92 F.Supp.2d 534, 542.) Thus, as the federal court in *Friend* explained in the context of the federal death penalty statute:

> relevance and heightened reliability . . . are two sides of the same coin. Together, they assure the twin constitutional prerequisites of affording a rational basis for deciding that in a particular case death is the appropriate punishment and of providing measured guidance for making that determination. Those objectives can only be accomplished if the proposed aggravating factor raises an issue which (a) is of sufficient seriousness in the scale of societal values to be weighed in selecting who is to live or die; and (b) is imbued with a sufficient degree of logical and legal probity to permit the weighing process to produce a reliable outcome.

(*United States v. Friend*, *supra*, 92 F.Supp.2d at p. 543; accord, *United States v. Karake* (D.D.C. 2005) 370 F.Supp.2d 275, 279; *United States v. Johnson* (W.D.Va. 2001) 136 F.Supp.2d 553, 558-559; *United States v. Bin Ladin* (S.D.N.Y. 2001) 126 F.Supp.2d 290, 302.) In other words, "an aggravating factor must have a substantial degree of gravity to be the sort of factor which is appropriate for consideration in deciding who should live and who should die." (*United States v. Friend*, *supra*, 92 F.Supp.2d at p. 544.)

Pursuant to these principles, several federal courts have recognized that minor incidents of only *de minimus* violent or forceful criminal conduct

– like a violation of the least adjudicated elements of section 4501.5 – are constitutionally irrelevant under the Eighth Amendment for purposes of capital sentencing. (See, e.g., *United States v. Grande* (E.D.Va. 2005) 353 F.Supp.2d 623, 634 [evidence of unadjudicated "high school fight" that occurred five years earlier and was wholly unrelated to charged murder was "unconstitutionally irrelevant to the determination of 'who should live and who should die'"]; *United States v. Gilbert* (D.Mass. 2000) 120 F.Supp.2d 147, 153 [conduct amounting to crime that did not result in significant injury was "of insufficient gravity to be relevant to whether the defendant here should live or die"]; *United States v. Friend, supra*, 92 F.Supp.2d at p. 545 [evidence that defendant and codefendant talked about killing potential witness was "not of sufficient relevance and reliability to assume the important role of an aggravating factor which, if proven, may be weighed as a factor to determine whether death is an appropriate penalty"].)[54]

Admission of evidence of the March 8, 1997 and April 18, 2000 incidents in this case violated these same Eighth Amendment precepts. Regardless of the general constitutionality of section 190.3, factor (b) as

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54. These cases construed the federal death penalty statute, which is similar in many respects, though not identical, to California's scheme. It lists 16 aggravating factors that apply when a defendant has been convicted of a homicide that is eligible for capital punishment. (18 U.S.C. § 3592, subd. (c).) It also contains a "catch-all" clause that allows the jury to consider the existence of "any other aggravating factor for which notice has been given." (*Ibid.*) The intent of this non-statutory aggravating factor is to permit consideration of constitutionally relevant evidence regarding the defendant's character and the circumstances of the crime. (See, e.g., *United States v. McCullough* (10th Cir. 1996) 76 F.3d 1087, 1106.) Thus, the cases address whether certain conduct is constitutionally relevant aggravation under this "non-statutory" aggravating factor.

appropriately focusing the jury on the defendant's violent criminality and thus his propensity for violence, when the evidence admitted under factor (b) fails to meet that ostensible purpose, there is Eighth Amendment error. That is precisely what happened here. The evidence that appellant "charged" toward the front of his cell, shielded by a mattress in attempt to exit his cell as ordered, and that he incidently may have touched an officer when he seized the pepper spray canister introduced into the penalty deliberations evidence that was constitutionally irrelevant to the jury's life or death decision and thereby ran afoul of the Eighth and Fourteenth Amendments.

3. Introduction of Evidence of the March 8, 1997 and April 18, 2000 Incidents Requires Reversal of Appellant's Death Sentences

The trial court's erroneous ruling on the March 8, 1997 and the April 18, 2000 incidents placed before the jury otherwise inadmissible evidence and thus injected invalid and irrelevant sentencing factors into the jury's penalty determinations. Pursuant to *Brown v. Sanders*, "if the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 221.) Here, the evidence of appellant's actions on the dates in question, which the prosecutor argued constituted an assault and a battery, respectively, against correctional officers in two different institutions, was legally insufficient and inadmissible. Because this evidence should not have been before the jury, and cannot be deemed harmless, appellant's death sentence must be reversed.

E. Evidence Presented in Aggravation Pursuant to Penal Code Section 190.3 Subdivision (b) Was Insufficient to Establish That Appellant Committed Uncharged Crimes of Force or Violence Beyond a Reasonable Doubt

Even if the trial court did not err in admitting the March 8, 1997 and April 20, 2000 incidents for the jury's consideration at the penalty phase based on the evidence before it, the prosecution still had the burden of proving each element of assault and battery beyond a reasonable doubt. (*People v. Robertson, supra*, 33 Cal.3d at p. 54.) Because it could not so do, these two incidents could not have properly been weighed by any juror in determining whether appellant should live or die. Further, as shown below, the evidence also was insufficient to establish the elements of five of the remaining "factor b" unadjudicated crimes beyond a reasonable doubt. The penalty phase thus was not only skewed by the introduction of the two invalidated sentencing factors, but also by the prosecution's decision to present so many alleged aggravating incidents that it could not actually prove.[55]

1. The Evidence Was Insufficient to Establish That Appellant Committed an Assault When He Attempted to Exit His Cell on March 8, 1997

In order to prove appellant committed an assault on March 8, 1997, the prosecution needed to establish beyond a reasonable doubt that he wilfully committed an act that "would probably and directly" result in violence to another. The prosecution could not and did not meet its burden of proof in this case.

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55. It is unclear why the prosecutor went to such great lengths to present this extremely weak evidence, some of which required the attendance of witnesses from Susanville, some 400 miles from the Kings County Courthouse.

The crime of assault required proof beyond a reasonable doubt of three elements: that 1) appellant person willfully and unlawfully committed an act that would "probably and directly" result in the application of physical force on another person; 2) appellant was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of his act that physical force would be applied to another person[56]; and 3) at the time of the act, appellant had the present ability to apply physical force to another person. (*People v. Williams* (2001) 26 Cal.4th 779, 788.)

Here, the evidence refutes any suggestion that appellant wilfully or intentionally engaged in an act that would likely lead to a battery. Instead, Dewall's testimony, both before and after the judge ruled the testimony admissible, and the videotape played for the jury, show that appellant was simply attempting to come to the front of the cell, as he had been ordered to do, and that he did so holding a mattress in front of his body to protect himself from the continuing onslaught of potentially lethal rubber bullets. That he was met at the cell door by six large correctional officers who immediately tackled him does not transform his act into a crime of violence.

Although Dewall used the word "charged" to describe appellant's forward motion, the best evidence, i.e the video of the incident, contradicts Dewall's assessment. In order to get to the front of the cell, which was the only way he could have avoided a forcible extraction after the bullets were fired, appellant threw himself over the top of the webbing, which Dewall

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56. In *Williams*, this Court upheld and clarified the mental state requirement for assault as previously articulated in *People v. Colantuono*, (1994) 7 Cal.4th 206, 214, and applied it to a case in which the instructions to the jury were ambiguous on this point. (*Williams, supra,* 26 Cal.4th at p. 783 [jury instructed under CALJIC No. 9.00 (1994 rev.)].) Accordingly, *Williams* applies to this case.

testified partially blocked egress or ingress to the cell. (6 RT 1256.)[57] Further, given the testimony that the bullet launcher was used, in part, to distract and disorient inmates, it was likely that appellant's movements towards the front of the cell were a result of his disorientation, and not an intentional use of force.

Moreover, appellant's use of the mattress as a shield contradicts any notion that he had an intent to apply force to anyone. While this Court has held that an intent to assault does not require an attempt at violence, in this case there was no evidence of any "indirect preparation" towards violence, evidence which this court has held would be sufficient to prove intent. (*People v. Chance* (2008) 44 Cal. 4th 1164, 1172, quoting *Hays v. The People* (N.Y. Sup.Ct.1841) 1 Hill 351, 353 ["There need not be even a direct attempt at violence; but any indirect preparation towards it, under the circumstances mentioned, such as drawing a sword or bayonet, or even laying one's hand upon his sword, would be sufficient."]) There was no evidence that appellant intended to make physical contact with guards, let alone evidence that would establish the intent element beyond a reasonable doubt. Dewall did not testify that appellant had such an intent. The use of the mattress actually dispels the notion of any intent to make violent contact, since appellant needed both hands to hold the mattress up. The mattress not only protected appellant from the rubber bullets, but also the correctional officers from contact with appellant's hands and feet.

Further, as this Court has reiterated, the necessary mental state "is an intent merely to do a violent act. [Citations omitted.]" (*People v. Colantuono* (1994) 7 Cal. 4th 206, 219.) Reckless conduct alone does not

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57. There was no evidence that appellant, rather than his cellmate, put up the webbing.

constitute a sufficient basis for assault or for battery even where the assault results in an injury to another. (*Id.* at p. 219, quoting *People v. Lathus* (1973) 35 Cal.App.3d 466, 469.) Although not controlling on the question, whether any injury occurred is relevant to the inquiry of whether the defendant attempted physical force against the person of another. (*Ibid.*) Here, the prosecution did not argue that the March 8 incident involved a battery and the evidence does not show that any battery was intended or actually committed by appellant on that date.

a. The Evidence Was Insufficient to Establish That Any Intentional Use of Force By Appellant During the March 8 Cell Extraction Was Not Done in Lawful Self-Defense

Following the presentation of the penalty phase evidence, the trial court determined *sua sponte* that the evidence regarding appellant's alleged acts of assault and/or battery in response to the cell extractions required him to instruct the jury on self-defense and the use of excessive force by correctional personnel. (7RT 1610-1612; 8RT 1627.) Accordingly, the jury was read a standard instruction, CALJIC 9.00 (1998 revision), on assault that included a slightly modified paragraph on self-defense.[58] The added

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58. CALJIC 9.00 was revised in 1998 to incorporate language that was suggested by an opinion of the Court of Appeal, *People v. Smith* (1997) 57 Cal.App.4th 1470. The 1998 revision included language that required a jury to find that the defendant "intended to use physical force upon a person or to do an act that was substantially certain to result in the application of physical force." However, in 2001, this Court rejected the holding in *Smith* and clarified that the test was not subjective, but rather objective. It thus held that, although the defendant need not actually know his act would result in the application of force, to constitute an assault, the defendant must have "actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*Williams, supra,* 26 Cal.4th at p. 790.) In this case,

paragraph read:

> A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense against the use of excessive force by a correctional officer. The People have the burden to prove that the application of physical force was not in lawful self-defense. If you have a reasonable doubt that the application of force was unlawful, you may not consider that activity as a circumstance in aggravation.

(8RT 1649; 10CT 2732.)

The court also instructed the jury on the use of reasonable force by modifying CALJIC 9.26, *sua sponte*, as follows:

> A correctional officer may lawfully require a prisoner to move from one cell to another for purposes of prison administration, and if a prisoner refuses to comply with lawful directions the correctional officer may use reasonable force to compel compliance.
>
> The officer need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the prisoner.
>
> Where a correctional officer is in the lawful performance of his duties, and the prisoner has knowledge, or by the exercise of reasonable care should have knowledge that he is being given lawful directions by a correctional officer, it is the duty of the prisoner to refrain from using force or any weapon to resist the directions of the correctional officer unless unreasonable or excessive force is being used against the prisoner.
>
> However, if you find that the correctional officer used unreasonable or excessive force in controlling the prisoner, the prisoner may lawfully use reasonable force to defend himself

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the trial court erred in instructing the jury with the 1998 revision to CALJIC 9.00 with regard to the alleged uncharged criminal acts that occurred in 1997. Nonetheless, the now-disfavored portion of the instruction that was revised in 1998, although error because it was inapplicable to the 1997 uncharged acts, has no bearing on any of the arguments raised herein.

against the use of excessive force.

(8RT 1651-1652; 10CT 2737.)

In addition, the court read the jury a slightly modified version of CALJIC 5.51, regarding self-defense. That instruction read:

> Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer excessive force, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger of suffering excessive force, and if that individual so confronted acts in self-defense upon those appearances and from that fear and actual beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent.

(8RT 1652; 10CT 2738.)

The trial court has a *sua sponte* duty to instruct the jury on a particular defense if it "appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Barton (*1995) 12 Cal.4th 186, 195, citing *People v. Sedeno* (1974) 10 Cal.3d 703, 716; compare *People v. Lucky* (1988) 45 Cal. 3d 259, 290-91 [finding trial court had no duty to instruct on self-defense and therefore prosecutor did not have burden of proving that defendant did not act in lawful self-defense where evidence raised no inference of justification.] Here, the trial court's sua sponte decision to instruct the jury regarding self-defense, in the absence of any reliance on that defense by appellant, indicates that there was substantial evidence to support it.

As the instructions make clear, in order to find that appellant engaged in criminal activity which involved the use or attempted use of force or

violence or a threat to use such force the prosecution had to prove beyond a reasonable doubt that the use of such force was unlawful, i.e. that appellant did not act in lawful self-defense. To support this finding, the prosecution had to establish that 1) the correctional officers did not use excessive force; 2) the correctional officers did not engage in behavior that appellant actually and reasonably believed put him in danger of suffering excessive force; and 3) appellant used unreasonable force to defend himself against a real or apparent danger. The prosecutor failed to establish any of these factors beyond a reasonable doubt.

b. Use of Lethal Force to Facilitate the March 8, 1997 Cell Extraction Was Unreasonable and Excessive

The evidence presented at trial showed that the March 8 cell extraction was ordered only because either appellant or his cellmate, Frutos, refused to remove some paper that covered the windows of their cell. Dewall testified that prisoners were not allowed to cover the windows because it prevented staff from looking into the cell; however, he also testified that the food port was not blocked, thereby affording the staff another means of seeing into the cell. Although correctional officers are *allowed* to use force when an inmate violates any order, that force must still be reasonable in relation to the threat posed by the inmate's failure to comply with the particular order. Here, there was little threat to institutional safety or security because officers could see into the cell if needed. It is thus questionable whether *any* force would have been necessary or reasonable in this instance, let alone the extreme force the officers utilized here.

Further, the stated purpose of the rule prohibiting inmates from covering their cells was to make sure the inmates are present and "alive and breathing." The evidence showed, however, that correctional officers knew

both appellant and Frutos were in the cell and alive at the time the rubber bullets were fired into the cell. Dewall testified that Frutos and appellant were asked to cuff-up and leave the cell in between each round of pepper spray preceding the use of the bullet launcher and that "both individuals declined." (6RT 1223-1224.) The use of lethal force to enforce the rule was thus unnecessary to maintain security and safety.

In addition, using force that could injure or kill an inmate is a completely unreasonable, if not absurd, way to enforce a rule designed to ensure an inmate is alive. The use of a similar launcher (referred to therein as a "gas gun") to shoot rubber bullets or blocks during cell extractions was described and criticized in *Madrid v. Gomez* (1995) 889 F.Supp. 1146:

> [It] can also cause serious pain and injury. Generally fired into the cell through the narrow food port, it ejects high speed rounds of rubber blocks (approximately 1 and ½ inches across) which ricochet in an unpredictable pattern around the cell. Given the small space of the cell, the ricochet has sufficient velocity to inflict significant pain or injury if it hits an inmate. As Captain Scribner testified, if such a ricochet hit an inmate's head, it could possibly cause "great bodily injury." Tr. 6–1113. Captain Jenkins similarly testified that it was possible that a ricochet from a gas gun round could strike an inmate in the face with sufficient force during a cell extraction to knock out his teeth. Jenkins Tr. 3–408. And should an inmate be hit directly at close range, the result could be serious injury and possibly death. Former Warden Fenton emphasized the serious nature of using a gas gun in cell extractions: "The pellet [gas] gun ... If it hits in the wrong place, it can result in serious injury or death.... Why would you fire that into a cell where the maximum distance doesn't exceed eight feet if, in your own opinion, it's capable of killing somebody?" Fenton Tr. 5–780.

(*Id* at p. 1175.) While the court in *Madrid* did not find the use of a rubber bullet launcher in cell extractions to constitute excessive force *per se*, it condemned the policy of routinely using a gas gun or launcher to shoot

rubber bullets into the small space of a cell at close range.[59] Despite the findings in *Madrid*, which were published in 1995, High Desert State Prison continued to routinely use the .37 mm launcher in extractions until at least 1997, when the present incident occurred.

The use of the launcher during the March 8 extraction was thus unreasonable and excessive, and the prosecution did not meet its burden of proving otherwise beyond a reasonable doubt. Accordingly, to consider the incident in aggravation, the jury had to find that appellant's response to this unreasonable and excessive force was itself unreasonable beyond a reasonable doubt. The evidence did not support such a finding.

Assuming appellant actually intended to use force to defend himself, he used the absolute minimum force necessary to do so. He used both hands to hold a mattress in front of himself as protection from the bullets and the pepper spray and simply tried push through the officers to get clear of their weapons. He did not use his hands or feet, or any other potential "weapon" to defend himself, and there was no evidence presented that he did anything but "come in contact" with the officers after they tackled him. If he had the right to defend against the use of excessive force, his response was entirely reasonable and he used no more force than was actually needed to stop the onslaught of bullets.

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59. As noted in *Madrid*, the written policy at Pelican Bay State Prison in effect in 1995 cautioned that "[g]reat care and conservative judgement [sic] must be used when utilizing these [gas gun] rounds at close distances. Staff must not aim the round directly at the main torso or head, of inmates, as the impact at short distance can severely injure or kill." (*Id.*, at fn. 46.) No evidence was presented regarding a similar policy at High Desert State Prison, and based on the incident on March 8, where the rounds were fired at close range blindly through the cell door, it is clear no such policy was followed, even if it did exist.

For these reasons, the evidence was not sufficient for any juror to find beyond a reasonable doubt that appellant committed an assault on March 8, 1997.

2. The Evidence Was Insufficient to Establish That Appellant Committed a Battery on March 12, 1997 at High Desert State Prison

The prosecution presented evidence regarding an incident involving appellant and his cellmate, Romo, that occurred on March 12, 1997 at High Desert State Prison. According to the prosecutor, appellant allegedly committed the uncharged crime of "gassing," or throwing excrement or bodily fluids on someone else. At the time of the incident, because there was no statute specifically criminalizing "gassing,"[60] the prosecutor contended that the act of gassing was a battery. (7RT 1595; 8RT 1671.) The evidence however, was wholly insufficient to establish that appellant threw any offensive fluid on anyone, and thus this incident should not have been considered by the jury as a factor in aggravation.

The sole evidence that a gassing occurred was presented through Kenton Dewall, who had been a correctional sergeant at High Desert State

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60. The legislature subsequently enacted Penal Code section 4501.1, specifically making "gassing" an aggravated battery. The crime of gassing is defined as:

> . . . intentionally placing or throwing, or causing to be placed or thrown, upon the person of another, any human excrement or other bodily fluids or bodily substances or any mixture containing human excrement or other bodily fluids or bodily substances that results in actual contact with the person's skin or membranes.

(Penal Code § 4501.1(b).)

Prison in 1997. He testified that on March 12, 1997, appellant was housed with a cellmate, an individual identified on the record only as "Romo." Dewall testified that Romo and appellant had covered their cell window and refused to take the coverings down, despite repeated requests. (6RT 1238.) When Dewall tried to look through the food port with a flashlight, two milk cartons containing yellow brown liquid smelling of urine and feces were thrown through the port, hitting his shield and splashing him in the face and arm. He furthered testified that Lt. Hahn also got splashed, but Hahn did not testify.[61] Dewall requested that both appellant and Romo cuff up and leave the cell, and then went to wash off. (6RT 1239-1240.) Dewall didn't know which inmate threw the liquid because he couldn't see into the cell. (6RT 1257.)

There was no evidence, circumstantial or otherwise, that appellant committed a battery by throwing offensive liquid on correctional personnel. Dewall admitted he had no idea whether appellant was the one that threw the liquid through the food port, and based on his testimony, it was equally likely that it was appellant's cellmate, Romo, who committed the allegedly violent act.

This Court has found evidence to be insufficient where, as here, "the evidence leaves it entirely possible defendant [committed the offense], but does not support a finding of [guilt] beyond a reasonable doubt." (*People v. Pearson* (2012) 53 Cal.4th 306, 319.) In *Pearson*, the prosecution charged the defendant with the use of a deadly weapon, a stick or stake with which the murder/rape victim had been beaten and sexually assaulted. The stick or stake was never recovered, and no other forensic evidence linked Pearson to

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61. There was no foundational evidence presented to establish how Dewall knew that the liquid also made contact with Hahn.

its use. Although Pearson admitted participation in the crime, he denied using the stake and no one testified that Pearson, as opposed to his crime partners, used the weapon himself.

Just as in *Pearson*, in this case no witness testified that appellant himself committed the gassing, no out-of-court statements to that effect were introduced, and no physical evidence indicated he had done so. Just as in *Pearson*, the evidence in this case "*could* lead a rational trier of fact *to suppose [the defendant] may have* [thrown the offensive liquids] but not to infer beyond a reasonable doubt that he did so." (*People v. Pearson, supra,* 53 Cal.4th at p. 319.) Thus, even viewing the trial evidence in the light most favorable to the prosecution and presuming every fact the jury could reasonably deduce from that evidence, there is nothing from which a rational trier of fact could have found beyond a reasonable doubt that defendant committed the offense. Because nothing established that appellant, instead of Romo, committed the gassing, his guilt of this uncharged battery was not proven beyond a reasonable doubt.

3. The Evidence Was Insufficient to Establish That Appellant Committed an Assault or Battery on March 12-13, 1997 at High Desert State Prison

a. Factual Background

Following the alleged March 12, 1997, incident of gassing, correctional officers conducted a tactical cell extraction of appellant and his cellmate in the early morning of March 13. The prosecution argued that appellant committed an assault and/or battery during the course of extraction. Unlike every other extraction that the prosecution presented to the jury, it did not produce a videotape of the March 13 incident. Thus, the sole evidence regarding the extraction was presented through the testimony of Kenton Dewall.

Dewall testified that the extraction was ordered at 1:30 a.m on March 13, after Romo and appellant had been asked to remove the coverings from their cell window several times. Dewall did not remember there being any webbing in the cell obstructing the officers entry into the cell during the extraction. (6RT 1248.) Dewall also did not know whether the lockers, to which inmates sometimes attached the webbing, had been removed before the incident, but it was "possible." (*Ibid.*) Dewall conceded on cross-examination that, even if the windows are covered, it was possible to see into the cell through the food port unless it was blocked. He testified the food port to appellant's cell on March 13 was not blocked "at all." (6RT 1251.)

Prior to sending the extraction teams in, OC pepper spray was shot into the cell using a Capsicum Z505 fogger, a canister with a tube and a needle-like device out of which the spray was shot. The needle could slide into a small opening. (6RT 1242.) Pepper spray was shot into the cell through the food port three times. According to Dewall, the occupants were asked to cuff-up and leave the cell in between each round of pepper spray, but did not "comply."

After using the pepper spray, a .37 mm launcher gun was used to fire multiple rounds of rubber bullets into the cell. The use of the bullet launcher was "policy and procedure" at the time. (6RT 1253.) Dewall testified that "approximately 6 rounds" were fired, and that he "believed" they were fired in the same manner as on March 8. Romo and appellant still did not cuff and exit the cell. (6RT 1244.)

As on March 8, two extraction teams were assembled on March 13, consisting of four men each. Each man was specially selected for his size and physical agility. The teams used on March 13 consisted of two men

approximately 6'2" tall and weighing over 250 pounds. Another was a member of the prison Special Emergency Response Team, similar to a SWAT team, that was used for riot control within the prison. (6RT 1241-1242.) Dewall testified that he initially sent six men into the cell, but two of the men left the cell during the procedure, including the "baton" man. Dewall then determined he had to enter the cell himself for the safety of the officers.

He observed two team members engaged in a "physical fight" with Romo. He also observed that appellant was "involved" in a fight with two other officers. By that time, appellant was on top of officer Hornbeck and striking him in the chest. (6RT 1246.) Dewall, who was 6'3" tall and weighed 255 pounds (6RT 1248), proceeded to strike appellant with a short-handle baton. The baton is 12 to 14 inches long with a string on the handle to attach it to the officer's wrist. (6RT 1256.) Dewall struck appellant "very hard" in the middle of his upper torso (i.e. his chest) approximately six times at one-two second intervals, until appellant rolled off Hornbeck and laid on the floor. (6RT 1246-1247.)

b. The Evidence Was Insufficient to Establish That Any Intentional Use of Force By Appellant During the March 13, 1997 Cell Extraction was Not Done in Lawful Self-Defense

Pursuant to the legal principles discussed above and the instructions provided to the jury, in order to find that appellant engaged in criminal activity which involved the use or attempted use of force or violence or a threat to use such force the prosecution had to prove beyond a reasonable doubt that appellant actually assaulted or battered officer Hornbeck and/or Dewall. The prosecutor failed to establish any of the elements of assault or

battery beyond a reasonable doubt with regards to the March 13, 1997 cell extraction.

The evidence presented at trial showed that the March 13 cell extraction was ordered because either appellant or his cellmate, Romo refused to comply with orders to remove paper that covered the windows of their cell. As set forth above, although correctional officers are *allowed* to use force when an inmate violates any order, that force must still be reasonable in relation to the threat posed by the inmate's failure to comply with the particular order. As with the March 8 extraction, there was little threat at all to institutional safety or security on March 13 1997, because the food port was not obstructed and officers could see into the cell if needed. It is thus questionable whether any force would have been necessary or reasonable in this instance, let alone the extreme force the officers utilized here.

The stated purpose of the rule prohibiting inmates from covering their cells was to make sure the inmates are present and "alive and breathing." For reasons set forth above, using a lethal bullet launcher that could injure or kill an inmate was an unreasonable way to enforce a rule designed to ensure an inmate is alive. (See, *Madrid v. Gomez*, *supra*, 889 F.Supp. 1146 at p. 1175.)

More importantly, there was no evidence from which a jury could infer, beyond a reasonable doubt, that appellant's "fight" with Hornbeck was an unlawful battery, because the prosecution failed to establish the circumstances that led up to the altercation. After using the bullet launcher, six large and physically agile men entered appellant's cell to forcibly remove him and his cellmate. The only evidence regarding appellant's behavior towards Hornbeck came from Dewall, who was not in the cell when the

incident began and thus could not testify how appellant came to be "on top of" Hornbeck, nor whether Hornbeck himself used unreasonable force, which would have allowed appellant to use reasonable force to defend himself. Inexplicably, Hornbeck was not called to testify to his actions prior to Dewall's observations, and no video evidence was offered.

Evidence is insufficient where, as here, "the evidence leaves it entirely possible defendant [committed the offense], but does not support a finding of [guilt] beyond a reasonable doubt." (*People v. Pearson* (2012) 53 Cal.4th 306, 319.) Thus, although the jury could suppose from Dewall's testimony that Hornbeck's initiating use of force was not excessive, it could not infer this fact beyond a reasonable doubt.

For these reasons, the evidence was not sufficient for any juror to find beyond a reasonable doubt that appellant committed an assault or battery on March 13, 1997.

4. The Evidence Was Insufficient to Show That Appellant Committed An Uncharged Act of Violence at Corcoran State Prison on November 13, 1999

a. Factual Background

The prosecutor presented evidence in aggravation regarding several different incidents that occurred on November 13, 1999. The first of these occurred outside appellant's cell, when Lopez, another inmate, was being escorted to the shower. The prosecutor argued that the evidence supported two separate uncharged crimes, possession of a sharpened instrument by a prisoner, and "spearing" with a weapon, i.e, an assault. (6RT 1207; 7RT 1596).

To support this argument, the prosecutor relied on the testimony of Jaime Tovar, a floor officer at Corcoran. On the afternoon of November 13,

1999, Tovar escorted Lopez to the shower. Tovar escorted Lopez by appellant's cell, Cell 6, which was directly next to the shower. Cell 6 had a special type of food port for management inmates as well as a standard food port. Tovar testified that due to improper welding, in some cells there were gaps between the sides of the standard food ports and the door. (6RT 1294-1297.) There were gaps in the standard port on the door of Cell 6, on the side closest to the shower. (6RT 1298.) The gap was at least 3/8" wide. (6RT 1313.)

As Lopez was entering the shower, Tovar saw him turn quickly to his right and "kick" something that was coming out of Cell 6. Tovar saw an object, and pushed Lopez into the shower and locked the door. The object was sticking out between the cell door and the food port, in the gap caused by defective welding. The object was just sticking out, there was no movement. (6RT 1315.) Tovar "kicked it" and it came apart. One piece was still sticking out of the gap in the cell door and was hard and looked liked rolled up paper. The other piece looked like a spoon handle that was sharpened to a point and bladed on both sides. Tovar picked this item up off the floor outside the cell. (6RT 1301- 1304.) The point was made from a zylon spoon. The paper was rolled into a telescoping handle. The two pieces fit together. (6RT 1308-1310.) Tovar testified that Lopez was not injured in any way. (6RT 1313-1314.)

Based solely on this evidence, the prosecution argued that appellant not only possessed a weapon, in violation of prison rules and Penal Code section 4502, subd. (a), but also that he committed an assault against Lopez by "spearing." The evidence was insufficient to support either of these uncharged offenses beyond a reasonable doubt.

b. The Evidence was Insufficient to Establish that Appellant "Possessed" the Sharpened Instrument Tovar Found Outside Appellant's Cell Beyond a Reasonable Doubt

To establish that appellant violated Penal section 4502(a),[62] the prosecution had to prove that he possessed, carried on his person, or had under his custody and control, a sharpened instrument. The jury was instructed that possession can be actual or constructive, and that constructive possession requires, inter alia, that "a person knowingly exercise control over or the right to control a thing." (8RT 1653, 10CT 2740.)

The evidence presented here shows that Lopez made a sudden movement when passing by appellant's cell, and after that movement, Tovar saw an object projecting from a gap in the front of appellant's cell. Officer Tovar did not testify that he ever observed the sharpened object itself in, or coming out of, appellant's cell; rather, he kicked at something that was already *outside* the cell, which immediately fell apart. The non-sharpened rolled paper piece was sticking out of the cell door. Tovar then saw a sharpened object on the floor of the unit and retrieved it.

This evidence is insufficient to show that appellant himself actually or constructively possessed a sharpened instrument because there was no evidence, beyond supposition, that it ever was within his custody and control. In fact, the only thing Tovar's testimony established was that appellant *possibly* had custody or control of a rolled piece of paper and not a

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62. Section 4502(a) criminalizes the possession or manufacture of weapons by incarcerated persons. This Court has held that a violation of section 4502(a) generally is admissible under factor (b) because it involves an implied threat of violence. (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 589, *aff'd sub nom. Tuilaepa v. California* (1994) 512 U.S. 967.)

sharpened instrument. Tovar's testimony did not establish that the sharpened and therefore prohibited piece of the object was ever inside appellant's cell, nor that appellant ever had any custody or control of this item. Tovar did not see any movement from appellant's cell from which the jury could infer, let alone infer beyond a reasonable doubt, that appellant once had control of the item that Tovar kicked to the floor.

The prosecution did not present evidence to demonstrate appellant himself put the object in the gap in the door or that he ever even touched it. It did not establish that *only* the occupant of Cell 6 could have placed the object in the gap, or that it could not have been placed there by someone walking by the outside of the cell. As such, even circumstantially, the prosecution could not meet its burden of proof that appellant had actual or constructive possession of the sharpened point found by Tovar on the floor of the unit.

c. The Evidence Was Insufficient to Establish That Appellant Assaulted Inmate Lopez on November 13, 1999

As set forth above, the prosecution argued that appellant "speared" Lopez when Lopez was escorted past appellant's cell on November 13, 1999. As an assault, the prosecution had to establish beyond a reasonable doubt that 1) appellant willfully committed an act that by its nature would probably and directly result in the application of physical force on another person; 2) that appellant was aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person; and 3) at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another. (*People v. Williams, supra,* 26

Cal.4th at p. 788.) The prosecution presented no evidence to support any of these elements.

First, there was no evidence that appellant himself committed any act, as all Tovar saw was inmate Lopez make a sudden movement. There was no evidence establishing that the item found protruding from appellant's cell was placed there *while* Lopez was walking by, and not sometime earlier. The evidence showed only that Lopez made a motion towards appellant's cell door, not that appellant made any motion towards Lopez. There was no evidence that appellant even knew someone was walking by his cell at the time the object was found and thus no evidence of any act by appellant that could have been intended to apply force to Lopez or anyone else.

Even assuming appellant did place this item in the gap in the door, there was no evidence that this type of makeshift weapon could actually be used to spear someone through a cell door as they walked by a cell. The object fell apart upon contact; no testimony was presented as to how it could have been used to apply force to a moving target or that such a spearing had ever occurred with a similar item. Thus, there was no evidence from which the jury could infer that appellant committed an act that "would probably and directly result in the application of physical force on another person." Moreover, absolutely no evidence was presented that appellant placed this item in the gap knowing "facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person." Finally, there was no evidence that appellant actually "had the present ability to apply physical force" from within his management cell, i.e. to execute a "spearing" with this type of

rolled paper weapon.[63]

These blanks in the evidence cannot be filled in by supposition or speculation. Evidence is insufficient where "the evidence leaves it entirely possible defendant [committed the offense], but does not support a finding of [guilt] beyond a reasonable doubt." (*People v. Pearson* (2012) 53 Cal.4th 306, 319.) Such is the case here, where the prosecution failed to establish any of the elements of assault beyond a reasonable doubt.

5. The Evidence Was Insufficient to Show That Appellant Committed an Uncharged Act of Violence at Corcoran State Prison on March 29, 2000

The prosecution presented evidence of an incident at Corcoran that occurred on March 29, 2000, that it contended was an uncharged threat of violence. To support this contention, the prosecution presented the testimony of two correctional officers and a videotape of a portion of the incident. The testimony of the officers is inconsistent and is not supported by the video of the actual incident. This evidence was not sufficient to prove that appellant committed an act of violence or threat of violence beyond a reasonable doubt.

a. Factual Background

According to Sgt. Kenneth Pearson, on March 29, 2000, appellant had covered his cell windows and requested to speak to Pearson. (7RT 1414-1417.) Due to conditions in the SHU unit, it was impossible to hear appellant through his cell door. The prison had moved all the SHU inmates in the mental health program into the building where appellant was housed, and the inmates were very noisy and disruptive. (7RT 1432.) That day, one

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63. No evidence was presented regarding the manner in which such inmate-manufactured weapons are actually used, or their effectiveness.

inmate had thrown liquid on two officers and refused to come out of the shower, and Pearson was waiting for a possible extraction. Several other inmates were holding food ports hostage, which required removing all staff.[64] Appellant was not causing any of the problems. Pearson told appellant he would come back after the situation was taken care of. (7RT 1414-1417.) Appellant said "I guess when you try to program you don't get anywhere. I got more attention when I was causing all the trouble." "Program" means following the rules and getting along with everyone. Appellant said he wanted to come out to the holding cell and talk to Pearson. (7RT 1418-1419.)

Despite all the problems in the unit and appellant's history, Pearson had appellant escorted to the holding cell in the rotunda by another officer, Francisco Mascarenas. Pearson followed them. In the holding cell, appellant told Pearson he wanted a "floater" radio. A floater was an extra that had been left in the system. Sometimes they gave floaters to inmates, even though it was against the rules. (7RT 1433-1434.) Appellant said he wanted the radio because of his upcoming trial and having a lot of time on his hands. Pearson told appellant he had broken the last two radios and tv he had been given and that someone higher up would have to decide. Pearson told appellant it wasn't going to happen. (7RT 1434.)

Pearson testified that sometime during his conversation with appellant, he saw appellant put "a paper" in the food port of the cell. Pearson asked him what it was; appellant said nothing and swept it off onto the floor. (7RT 1420-1421.) Pearson was approximately three feet away from the holding cell during the conversation. (7RT 1422.) Pearson's

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64. According to Pearson, an inmate takes a food port "hostage" by putting his hand into the port to keep it from closing.

testimony contradicted the testimony of Mascarenas.

Officer Mascarenas testified that he was in the rotunda on March 29, 2000 because he had just gotten "gassed" in the unit and he had to write a report on the incident. He testified that began to film a video when he saw appellant put a weapon in the food port of the holding cell of the rotunda. Appellant was speaking with Pearson, Mascarenas' supervisor. (7RT 1437-1439.) Mascarenas saw Pearson walk away from the holding cell. He then saw appellant retrieve the weapon from the food port, put it in his boxer shorts and pull his T-shirt over it. Mascarenas stopped recording then and told appellant he would have to give up the weapon. Appellant agreed to do so. (7RT 1441.) Mascarenas placed a trash can from the office six-eight feet from the cell and walked away. He heard a clunk, returned and saw a weapon in the trash can. (7RT 1441-1442.)

Mascarenas did not report finding the weapon to Pearson nor did he write a contemporaneous report. He did not put the weapon into evidence, nor did he in any way maintain or document a chain of custody. He simply left the weapon in the trash can, which he then returned to the office area (7RT 1442-1443.) Mascarenas admitted he did not report finding the weapon and that it was a mistake. (7RT 1450.) He didn't tell Pearson about the weapon because he assumed Pearson knew appellant had it. (7RT 1449-1450.)

Pearson testified that he learned of the incident some time later, after another unnamed officer asked him if he knew about the weapon. He did not see any weapon during his conversation with appellant, nor did he know he was being videotaped by Mascarena. (7RT 1422-1424, 7RT 1435.) Even after learning of the incident, he did not know what happened to the weapon. It was not until Pearson was considering a cell extraction to remove the

weapon from appellant that Mascarenas told him appellant already had tossed the weapon in the trash. (7RT 1425.)

Pearson saw a weapon in the trash can in the office. (7RT 1426.) He was aware that the officers at Corcoran sometimes threw away inmate weapons so they wouldn't have to do the paperwork or write a report. (7RT 1435-1436.) The weapon Pearson found in the trash can was 6" long and had a handle made out of tightly rolled paper, with string wrapped around it. (7RT 1426.) The blade was ½ to 3/4 inches long, sharpened to a point on one end and had doubled edges. (7RT 1431; P-Ex E1, E2.) After retrieving the weapon, Pearson had appellant escorted back to his cell without incident. (7RT 1426; 7RT 1436.)

The jury also saw the videotape made by Mascarenas. (7RT 1447; P-Ex-2.) The videotape shows appellant in the holding cell, which had open bars in front, rather than a solid door like appellant's cell. A large item can be seen in the food port from the time the video begins until Pearson walks away from the cell. The camera zooms in on the food port and shows that the item there appears to be a sharp instrument. At no time does appellant sweep the item to the floor or touch it until after Pearson walks away. (P-Ex F.)

b. The Evidence Was Insufficient to Establish That Appellant Committed an Unlawful Threat of Force or Violence While in the Rotunda on March 29, 2000

As the evidence above plainly shows, appellant's actions on March 29, 2000 did not threaten anyone. Assuming that the evidence established, despite the lack of foundation, that the item found by Pearson in the trash can was the item that appellant gave to Mascarenas, the mere possession of a weapon does not establish proof beyond a reasonable doubt of an implied

threat of use of force or violence, a necessary element of factor (b) evidence.

This Court has held that a "defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b) because such conduct is unlawful and involves an implied threat of violence even where there is no evidence defendant used or displayed it in a provocative or threatening manner." (*People v. Tuilapea, supra*, 4 Cal.4th at p. 589.) However, even if the evidence of the March 29 incident was generally admissible, the evidence refutes any inference that appellant's conduct constituted "an implied threat of violence." (*Ibid*, citing *People v. Mason* (1991) 52 Cal.3d 909, 956–957 [The trier of fact is free to consider any "innocent explanation" for defendant's possession of the item, even if such inferences do not render the evidence inadmissible per se].)

Here, no reasonable trier of fact could have concluded that appellant made an express or implied threat of violence on March 29, 2000. Pearson did not see any weapon in the holding cell, and there was no evidence that appellant placed it there. Even if the jury might infer he did place it there, the evidence wholly dispelled any basis that was a threat. The item was in plain view of Mascarenas for three or four minutes, while his supervising officer was standing close to the open bars of a holding cell talking to a somewhat agitated inmate facing trial for the murder of two prison inmates and the assault of a correctional officer with a sharpened weapon. (P-Ex F2.) Despite this, Mascarenas did not alert Pearson about any potential threat, but simply began to videotape the incident. Had appellant's actions threatened Pearson, actually or by implication, Mascarenas certainly would not have been so cavalier in his response, but would have taken steps to protect Pearson. Mascarenas' explanation for failing to warn Pearson– that he assumed Pearson knew the weapon was there – merely reinforces the

notion that appellant's actions that day threatened no one. If appellant's access to the item in the food port constituted a threat, and Pearson was aware it was there, he would not have remained in close proximity to appellant, and would not have simply walked away, leaving appellant to take possession of the weapon. Yet Mascarenas, a correctional officer with 12 years of experience at Corcoran (7RT 1437), believed that is exactly what happened. The evidence simply does not demonstrate any real or implied threat.

6. The Evidence Was Insufficient to Show That Appellant Committed an Uncharged Act of Violence at Corcoran State Prison on April 15, 2000

a. Factual Background

The prosecution presented evidence regarding a search of appellant's cell on April 15, 2000. It contended that this evidence established that appellant had custody or possession of a sharpened instrument, which was an implied threat of force or violence pursuant to factor (b). The evidence was not sufficient to support this assertion beyond a reasonable doubt.

On April 15, 2000, a correctional officer saw unusual movement in appellant's cell. Officer Henderson testified that he saw appellant standing on the top of the left bunk, trying to cover the light with a blanket. Appellant jumped down to the floor, bent over the sink and then jumped back on the bunk, reaching for the light several times. Henderson notified the floor officers about this activity. (6RT 1383-1387.) Floor officer Butts also saw appellant jump up and then jump down from his bunk to the floor. (7RT 1391.) Appellant had covered his light. Butts testified that inmates often covered the lights in the cell with a blanket to darken their cells so they

can sleep. (7RT 1393.) Appellant uncovered the light when asked to by Butts. (7RT 1393.) Butts saw what looked like six-inch groove cut into the plexiglas light fixture. Appellant was completely cooperative and was removed from the cell. (7RT 1393, 1412.)

After appellant was removed, Butts saw scratches on the side of the bunk and plastic-like shavings on the floor. (7RT 1393-1397.) Butts did not see appellant making any scrapes and did not know when the scrapes were made. (7RT 1399.) Butts testified that while he was searching under the mattress he found three weapons rolled "underneath" or "in" a blanket on the right side of the bunk. (RT 71401-1402; 1409.) Butts did not photograph the weapons as he found them, but instead arranged them on the bed and took a picture. He then claimed that when he found them, they were thrown across the bunk, so he had to move them to photograph them altogether. (7RT 1409.)

Butts did not know when appellant was placed in Cell 25, but appellant had not been there continuously. Appellant was out of the cell to go to court or for a medical reason and Butts was not there the day he was returned to the cell. Butts did not search Cell 25 prior to appellant's return to the cell and did not know the condition of the cell at the time of his return. (7RT 1411-1412.)

b. The Evidence Was Insufficient to Establish That Appellant "Possessed" the Sharpened Instruments Found Inside Cell 25 Beyond a Reasonable Doubt

To establish that appellant violated Penal Code section 4502(a), *supra* at fn. 62, the prosecution had to prove that he possessed, carried on his person, or had under his custody and control, a sharpened instrument. The jury was instructed that possession can be actual or constructive, and that

constructive possession requires, inter alia, that "a person knowingly exercise control over or the right to control a thing." (8RT 1653, 10CT 2740.) In this case, there was no evidence from which a reasonable juror could infer that appellant knew the weapons were there, or that he had control over the items found in the cell after he was removed. (*People v. Pearson, supra,* 53 Cal.4th at p. 319.)

No witness saw appellant make or manufacture the instruments. Henderson testified that when he saw appellant jumping up from the bunk towards the light, appellant was covering the light with a blanket, not scraping the fixture. When Butts observed the cell shortly after Henderson, the light was completely covered. Butts conceded that inmates like to cover their lights with a blanket in order to sleep. This evidence thus was not sufficient to establish, beyond a reasonable doubt, any connection between the weapons later found in Cell 25 and appellant's actions.

Similarly, the evidence presented regarding the discovery of weapons in appellant's cell after he was removed on April 15, 2000 was insufficient to establish that appellant placed them there. No evidence was presented from which a juror could infer that appellant had sole access to the cell before the items were found, or that the weapons could not have been put there before appellant's return to Cell 25. No one testified, and no documentation was presented, that the cell was searched and inventoried after appellant was out of the cell before April 15 or prior to appellant's return to the cell. Butts did not even properly document his discovery of the items and it is unclear whether they were under the mattress, rolled up or in a blanket, or thrown all across the bunk.

Just as in *Pearson*, the evidence in this case "*could* lead a rational trier of fact *to suppose [the defendant] may have* had possession or control

of the weapons, but not to infer beyond a reasonable doubt that he did so." (*People v. Pearson, supra,* 53 Cal.4th at p. 319.) Thus, even viewing the trial evidence in the light most favorable to the prosecution and presuming every fact the jury could reasonably deduce from that evidence, there is nothing from which a rational trier of fact could have found beyond a reasonable doubt that defendant violated section 4502(a).

7. The Evidence Was Insufficient to Establish That Appellant Committed Any Uncharged Act of Violence or Threat of Violent Assault on April 18, 2000 at Corcoran State Prison

The evidence presented and procedural history regarding admission of this incident are set forth in section C3, *supra.*

a. The Evidence was Insufficient to Establish That Appellant Possessed a Sharp Instrument on April 18, 2000

As set forth above, the trial court held that evidence of the April 18, 2000 incident, was admissible only to establish that appellant committed a battery. (7RT 1480.) In keeping with this ruling and the trial court's reasoning that the evidence did not establish that appellant violated the statute prohibiting possession of a weapon when he seized the pepper spray canister, the prosecution did not request, nor did the judge read, an instruction that possession of such an instrument could violate section 4502(a). Similarly, the prosecutor also did not request, nor was the jury instructed on, the elements of section 4502(b), which prohibits the manufacture or attempted manufacture of a weapon.

Although the trial court found that the evidence regarding the April 18[t] incident only was admissible establish a battery (7RT 1480), the prosecutor nonetheless questioned Gatto regarding the sharpness of the broken glass, even after the court's ruling. He also pointed to appellant's

smashing of the window during his penalty argument. (8RT 1680.) This evidence and argument was only relevant to show that the broken glass was a sharp instrument and that possession of such glass by a prisoner would violate section 4502(a). Moreover, because of the other factor (b) incidents involving the alleged possession of a sharp instrument, the jury was instructed generally that it was a crime for a person in custody to possess "any instrument or weapon commonly known as sharp instrument." (8RT 1652; 10CT 2739.)

To the extent the prosecutor argued that appellant's breaking of the window in his cell door violated section 4502(a), it failed to prove the elements of that offense beyond a reasonable doubt. To establish that appellant violated section 4502(a) after he broke his cell window, the prosecution had to prove that he possessed, carried on his person, or had under his custody and control, a sharpened instrument. (8RT 1653, 10CT 2740.)

The only testimony regarding the breaking of the window came from Lt. Gatto. His testimony not only failed to establish the elements of 4502(a) but affirmatively disproved them. Gatto testified only that the pieces of the window fell on the *floor of the unit*. He stated outside the jury's presence that "glass came *outward* on the section floor." (7RT 1471) Before the jury he similarly testified that "there were glass fragments on the section floor." (7 RT 1482.) The only other evidence presented was the videotape of the incident. Consistent with Gatto's testimony, the tape shows the window breaking outward, into the prison unit, and that no pieces of the window fell into appellant's cell; indeed, it appears from the tape that the inner side of the window, facing into appellant's cell, remained intact. (P-Ex H-2.) Since there was no evidence presented to show appellant ever had any of the

window pieces in his cell, it could not establish that he had actual or constructive possession of any sharpened instruments on April 18.

Moreover, Gatto's testimony did not establish that the broken window pieces were a weapon or "sharp instrument." There was no testimony before the jury that the slivers of glass were large enough to be picked up and held to be used as any kind of "instrument." There was no testimony before the jury that edges were even sharp. Gatto answered affirmatively when asked whether the glass had "the ability to carry a sharp edge" and whether it "can be used to assist" in the construction of a weapon. (7RT 1482.) That evidence does not show or even suggest that the glass from the window was in fact "a sharp instrument." No testimony or evidence was presented that a sliver or shattered piece of an interior cell window could or had ever been used as a weapon, nor could the jury properly so infer from the evidence.

b. The Evidence Was Insufficient to Establish that Appellant Committed a Battery on April 18, 2000 at Corcoran State Prison

As set forth above, the trial court did find the evidence regarding the April 18 incident admissible to establish that appellant committed a battery when he pulled the pepper spray canister into his cell. However, the court also determined *sua sponte* that the evidence required instructions on excessive force and both complete self-defense and imperfect self-defense. (7RT 1610-1612; 8RT 1627.)

In order to find that appellant engaged in criminal activity which involved the use or attempted use of force or violence or a threat to use such force the prosecution had to prove beyond a reasonable doubt that the use of such force was unlawful, i.e. that appellant did not act in lawful self-defense. To support this finding, the prosecution had to establish that 1) the

correctional officers did not use excessive force; 2) the correctional officers did not engage in behavior that appellant actually and reasonably believed put him in danger of suffering excessive force; and 3) appellant used unreasonable force to defend himself against a real or apparent danger. The prosecutor failed to establish any of these factors beyond a reasonable doubt.

c. The Evidence Was Insufficient to Establish that the Seizure of the Pepper Spray Canister was Not Done in Lawful Self-Defense

The evidence presented at trial showed that pepper spray was used on appellant on April 18 only because he refused to move to a different cell. Although correctional officers are *allowed* to use force when an inmate violates any order, that force must still be reasonable in relation to the threat posed by the inmate's failure to comply with the particular order. Here, no evidence was presented that showed appellant's non-compliance threatened institutional safety or security to such a degree that it was necessary to use any chemical agent to force appellant to leave his cell voluntarily.

Nonetheless, the manner in which the pepper spray was used by Gatto in this case was unnecessary and excessive. As the video evidence plainly showed, Gatto fired a continuous high-powered spray of the chemical agent directly at appellant for a period of 13-15 seconds. (P-Ex H2.) He did not fire one short burst and then wait to see if it had any affect on appellant, as he testified, but simply put his hand on the trigger and held it down until appellant managed to stop the onslaught by pulling the canister away from Gatto.[65]

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65. The videotape evidence effectively negated and disproved Gatto's testimony on these points. In light of Gatto's testimony that the video was an accurate representation of the incident, this Court must credit the video evidence over Gatto's recollection. As this Court has found, a

Pepper spray "'is designed to cause intense pain,'and inflicts 'a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx,' as well as 'disorientation, anxiety, and panic.'" (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1161-1162, quoting *Headwaters Forest Defense v. County of Humboldt* (9th Cir.2000) 240 F.3d 1185, 1199–1200, vacated and remanded on another ground (2001) 534 U.S. 801.) Manufacturer's instructions and training materials for law enforcement on the safe use of OC pepper spray mandate the use of very short bursts lasting two-three seconds or shorter, even when the chemical is sprayed outside, rather than in a small enclosed area.[66] As the reported cases addressing the use of pepper spray by police and correctional personnel establish, even in the most dangerous situations, bursts of pepper spray are limited to no more

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photograph is "a device whose memory is without question more accurate and reliable than that of a human witness." *People v. Bowley* (1963) 59 Cal. 2d 855, 861. And, as another court put it: "If a picture is worth a thousand words, a moving picture is worth a million." (*People v. Webb* (1999) 74 Cal.App.4th 688, 690.)

66. See e.g., *Greene v. Barber* (6th Cir. 2002) 310 F.3d 889, 899 [Grand Rapids Police Department's Manual of Procedures "allow of use oleoresin capsicum in one to two second bursts . . . ."]; *Danley v. Allyn* (N.D. Ala. 2007) 485 F. Supp. 2d 1260, 1263 *aff'd sub nom. Danley v. Allen* (11th Cir. 2008) 540 F.3d 1298 ["jail policy and procedure and manufacturer instructions . . . provide for a one-second burst of spray . . . ."]; New York City Police Department Procedure Number 212-95, http://www.nyc.gov/html/ccrb/pdf/pepperreport.pdf, at append [as of June 22, 2012]. See also the Department of Defense, Nonlethal Weapons and Equipment Review: A Research Guide for Civil Law Enforcement and Corrections, available at https://www.ncjrs.gov/pdffiles1/nij/205293.pdf at p. 25 [as of June 22, 2012], which describes the MK46 pepper spray canister as containing enough chemicals to fire 12 one-second bursts.

than three seconds duration and generally only last *a half-second*.[67] There can be medical contraindications to the use of OC gas. Gatto provided no explanation for his use of the spray in a manner that contradicted all policies and guides for its safe use and thus the prosecution could not prove that it was not an excessive use of force. Even if Gatto's testimony that the bursts were only three-five seconds long could be credited, which it cannot, a burst of any longer than two seconds was excessive when compared with the policies, guidelines and the practices of law enforcement, military and correctional personnel throughout the country. Indeed, even during the particularly brutal March 8, 1997 extraction at High Desert State Prison in this case, pepper spray was shot in bursts of a maximum of two seconds duration. (6RT 1223-1224.)

Accordingly, to add the April 18, 2000 incident to the factors in aggravation weighing against a life sentence, the jury had to find that

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67. See e.g., *People v. Gutierrez* (2009) 174 Cal. App. 4th 515, 518 ["a couple of two second bursts of pepper spray"]; *People v. Pruett* (1997) 57 Cal. App.4th 77, 81 [a two-second burst of pepper spray]; *Wilkins v. Ramirez* (S.D. Cal. 2006) 455 F. Supp. 2d 1080, 1103 [a one second burst of pepper spray]; *Dunn v. Vill. of Put-In-Bay* (N.D. Ohio 2003) 291 F. Supp. 2d 647, 648-49; *Avett v. State* (1996) 325 Ark. 320, 321 [a half-second burst of pepper spray]; *State v. Tagaolo* (2000) 2 P.3d 718, 720 (Haw. Ct. App.) [a one-second burst of pepper spray]; *People v. Wrencher* (2011) 959 N.E.2d 693, 699 [a one-second burst of pepper spray]; *State v. Garcia* (2009-NMSC-046) 147 N.M. 134, 137 [a one-second burst of pepper spray]; *State v. Parker* (2007) 187 N.C. App. 131, 134 [one and a half second burst of pepper spray]; *State v. Bowshier* (2006) 167 Ohio App. 3d 87, 91, 853 N.E.2d 1210, 1213 [a half-second burst of pepper spray]; see also, *Ruiz v. Johnson* (S.D. Tex. 1999) 37 F. Supp. 2d 855, 935-36, rev'd and remanded sub nom. *Ruiz v. United States* (5th Cir. 2001) 243 F.3d 941 [reporting expert testimony that four administrations of pepper spray in two second bursts, each five minutes apart, was *more than* was normally used in other prison systems in the United States.]

appellant's response to this unreasonable and excessive force was itself unreasonable beyond a reasonable doubt. The evidence did not support such a finding. Appellant grabbed for the canister after Gatto had been spraying him with pepper spray for at least *13 seconds*, or 13 times the recommended duration for safe use. Appellant used no force beyond that necessary to stop the chemical attack. Gatto was barely aware that appellant made any physical contact with him. Notably, he did not grab Gatto's hand, but simply disarmed him so Gatto could not continue to spray him. Once appellant had the canister in the cell, he made no attempt to assault or spray anyone with it. If appellant had the right to defend against the use of excessive force, his response was entirely reasonable and he used no more force than was actually needed to stop Gatto's excessive use of pepper spray.

For these reasons, the evidence was not sufficient for any juror to find beyond a reasonable doubt that appellant committed a battery on April 18, 2000.

F. The Instructions Erroneously Directed the Jury To Find that Appellant's Unadjudicated Other Crimes Involved the Use or Threat of Force or Violence And Were Incomplete and Misleading

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any criminal activity that involves the "use or attempted use of force or violence or the express or implied threat to use force or violence." Assuming arguendo that the evidence relating to all of the unadjudicated alleged criminal acts was admissible under factor (b), the ultimate issue as to whether each separate alleged criminal act rose to the required level of force or violence was one for the jury to decide. Here, the trial court took this issue out of the jurors' hands by erroneously instructing them that, if each element of the unadjudicated crimes was proven beyond a

reasonable doubt, each proven crime was necessarily a crime involving the express or implied use of force or violence or an actual threat of force or violence.

Appellant is aware that this Court has recently ruled that the jury determines only whether the prosecution has proved that the defendant committed the unadjudicated crime, while the question of which crimes meet the force or violence requirement is a legal issue to be determined by the court. (See e.g., *People v. Lewis* (2008) 43 Cal.4th 415, 530; *People v. Nakahara* (2003) 30 Cal.4th 705, 720.) Appellant asks this Court to reconsider this question and to hold that the jury decides both whether the defendant committed the unadjudicated crime suggested by the prosecution's evidence *and* whether that crime involves force or violence as required by factor (b).

Because the instructions in this case told the jury that the alleged criminal activity, if proven, *did involve* the requisite force or violence (or threat thereof), the instructions given with regard to unadjudicated crimes were erroneous, deprived appellant of a jury determination of whether or not this evidence was properly to be considered as aggravation (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15), and compromised the reliability of the penalty verdict in violation of Eighth Amendment standards. If the instructions did not contain a mandatory presumption, then they were erroneous for another reason: the jury was not instructed on the definition of force or violence as used in factor (b). This further instructional error resulted in an unfair, arbitrary and unreliable imposition of the death penalty in violation of the state and federal Constitutions. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th and 14th Amends.)

This Court has not been consistent on the central point of what the

jury decides with regard to factor (b) evidence. In *People v. Nakahara* (2003) 30 Cal.4th 705, 720, this Court ruled, without citation or explanation, that "[t]he question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court." The Court repeated this ruling in *People v. Monterroso* (2004) 34 Cal.4th 743, 793 and *People v. Loker* (2008) 44 Cal.4th 691, 745, again without elaboration and citing only to *Nakahara* in *Monterroso* and to both *Nakahara* and *Monterosso* in *Loker.*

However, between the decisions in *Monterroso* and *Loker*, this Court clearly indicated that the question of whether a particular criminal act involved sufficient force or violence to be weighed as an aggravating circumstance under factor (b) was for the *jury* to decide. In *People v. Dunkle*, *supra*, 36 Cal.4th 861, the prosecution presented other-crimes evidence of a residential burglary under factor (b). The defendant challenged the trial court's failure to define "express or implied threat to use force or violence" as used in factor (b). (*Id.* at p. 922.) Rejecting the claim, the Court was unequivocal about the jury's task:

> the general section 190.3, factor (b) instruction, and CALJIC No. 8.87 adequately conveyed to the jury that before it could consider the Rennie incident in aggravation it had to find, beyond a reasonable doubt, all of the elements of the offense of burglary *and that the offense involved the use or attempted use of force or violence, or the express or implied threat to use force or violence.*

(*Id.* at pp. 922-923, italics added.) Thus, under factor (b), the jury decides both the question of whether the defendant committed the charged crime and what the Court in *Nakahara* denominated "the legal matter" of whether that crime involved force or violence. Indeed, this view is strengthened by the

Court's assertion in *Dunkle* that factor (b) "possesses a 'common-sense core of meaning . . . that criminal *juries* should be capable of understanding.'" (*Id.* at p. 922, quoting *Tuilaepa v. California*, *supra*, 512 U.S. at p. 975, italics added and first internal quotation marks omitted.) If juries took no part in deciding whether the alleged crime met the "force or violence" requirement of factor (b), there would have been no reason for this Court to make this statement.

Moreover, section 190.3 itself envisions that juries have a role in determining not just whether the alleged crime is proved, but also whether it qualifies as a factor (b) aggravator. The first paragraph of section 190.3, sets out the categories of evidence that the jury considers at the penalty phase, including "the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the express or implied threat to use force or violence." The second paragraph of the section imposes an express limitation: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." (Penal Code § 190.3.)

The statute's structure thus makes clear that whether the criminal act alleged involves "force or violence" under factor (b) is a preliminary fact on which the admissibility of the evidence depends. (Evid. Code, § 400.) The "force or violence" question addresses the relevance of the other-crimes evidence, which generally is initially determined by the trial court to ensure that there is sufficient evidence to support its finding, but is finally determined by the jury. (Evid. Code, § 403, subd. (a)(1).) It does not involve a determination of the competency of the prosecution's evidence,

which would be first and finally decided by the trial court. (Evid. Code, § 405, subd. (a).) In this way, the trial court at a *Phillips* hearing may decide that there is sufficient evidence to prove both the criminal activity alleged and the "force or violence" requirement of factor (b). But this initial determination does not end the inquiry. The jurors deliberating the other-crimes evidence make the final decision as to the sufficiency of the proof on both questions.

This approach to the adjudication of factor (b) is consistent with the jury's role in deciding the other sentencing factors in section 190.3. The court does not definitively decide any predicate preliminary facts concerning the admissibility of any of the other enumerated aggravating and mitigating factors. For example, under factor (d), the jury, not the trial court, decides whether the defendant committed the offense under "mental or emotional disturbance" and whether such disturbance was "extreme." Under factor (g), the jury, and not the trial court, decides whether the defendant acted under "duress" or the "domination of another person" and whether the duress was "extreme" and the domination was "substantial." There is no reason to treat the "force or violence" element of factor (b) differently than the qualifying terms that restrict factors (d) and (g). All elements of the aggravating and mitigating factors are to be decided in the last instance by the jury.

For all these reasons, the Court's unexplained and unsupported statements in *Nakahara*, *Monterosso* and *Loker* that the trial court determines the factor (b) "force or violence" question is partially mistaken. Both the trial court and the jury decide this fact.

1. The Instruction in This Case Created a Mandatory Presumption

In this case, the jury was instructed that:

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal acts which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(8RT 1647; 10CT 2730.) This instruction improperly decided against appellant the issue of whether or not his actions constituted a crime of violence within section 190.3, factor (b), and deprived him of a jury determination of whether or not this evidence was properly to be considered as aggravation.

Appellant had a due process right to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) Here, the instruction violated due process by creating a mandatory presumption that the evidence constituted an actual or implied use or threat of force or violence. The second sentence of the instruction focused the jury on deciding whether appellant had committed criminal acts without requiring that they also find beyond a reasonable doubt that the criminal acts involved

the use, or the threat, of force or violence. Rather, once the jury found the underlying fact to be true, they were to presume that it constituted an implied use or actual threat of force or violence and apply the aggravating factor against appellant. (See *Francis v. Franklin, supra,* 471 U.S. at p. 314 ["mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts"]; *People v. Figueroa* (1986) 41 Cal.3d 714, 724 [instruction effectively directed verdict by removing other relevant considerations if the jury finds one fact to be true].) This foreclosed any independent consideration of the required elements of the aggravating factor. (*Carella v. California* (1989) 492 U.S. 263, 266.)

For example, this Court has found that non-violent escape attempts are not admissible under section 190.3, factor (b). (*People v. Boyd, supra,* 38 Cal. 3d at p. 776.) However, the jury instruction precluded any defense to whether the alleged criminal acts involved a threat or implied use of force or violence. The instruction directed the jury to infer the implied use or the threat of force or violence once the criminal activity was proved. Accordingly, the instruction improperly removed the factual issue of appellant's actual or implied threat of force from the jury's consideration in violation of appellant's statutory and due process rights. (See *People v. Figueroa, supra,* 41 Cal.3d at pp. 725-726.)

2. The Trial Court Did Not Define the "Force or Violence" Requirement for Factor (b)

As with all jury instructions, the instructions on factor (b) "should be accurate and complete." (*People v. Montiel* (1993) 5 Cal.4th 877, 942; accord, *People v. Prieto* (2003) 30 Cal.4th 226, 268.) The instructions given to appellant's jury were not. The instructions were incomplete and misleading because they did not define the "force or violence" elements of

factor (b). Since, as argued above, the penalty phase jury must decide whether evidence presented under factor (b) establishes criminal activity of force or violence, the jury instructions should have accurately defined "force" and "violence." Despite this, the only definition of force or violence contained in any of the instructions was that of the minimal touching required for misdemeanor battery. As a result, the jury was given an inadequate and inapplicable instruction on the ultimate issue to be decided by them under factor (b), which was whether appellant's actions during the incidents in aggravation were criminal activity "involving the express or implied use of force or violence or the threat of force or violence." This instructional error resulted in an unfair, arbitrary and unreliable imposition of the death penalty in violation of the state and federal Constitutions. (Cal. Const., art. I, §§ 15, 17; U.S. Const., 8th and 14th Amends.)

Here, the prosecution introduced evidence of ten separate incidents pursuant to factor (b). The trial court and the parties agreed that the evidence admitted to establish these incidents could be used by the prosecution to argue that appellant committed assault by a prisoner, battery by a state prisoner on a non-confined person, or violated the statutes prohibiting possession of certain specified weapons. Accordingly, the prosecutor argued that appellant committed assaults on March 8, 1997, March 12- 13, 1997, December 18, 1997, November 13, 1999, November 14, 1999, and April 18, 2000. The prosecution also argued that appellant had committed a battery by "gassing" on March 12, 1997, a separate battery during an extraction on March 12-13, 1997, and a battery on April 18, 2000. The prosecution also argued that appellant violated the statute prohibiting possession of certain weapons by a prisoner in two separate incidents on November 13, 1999, and on March 29, 2000, April 15, 2000 and April 18,

2000. (Penal Code § 4502(a).)[68]

In keeping with this, the trial court instructed generally on factor (b) CALJIC No. 8.87, and gave slightly modified versions of CALJIC No. 9.00 on assault, CALJIC 9.01 on the "present ability to commit injury" element for assault, CALJIC 7.37 on battery by a state prisoner on a non-confined person (§ 4501.5), CALJIC No. 16.141 on the definition of "force and violence" for battery, CALJIC No. 7.38 on possession of a sharp instrument by an incarcerated person, and CALJIC 1.24 on the definition of "possession" (RT 1647-1653; 10CT 2730, 2732-2736, 2739-2740.)[69]

The only instruction concerning force or violence was the instruction on the definition of battery contained in CALJIC No. 16.141.[70] Given the

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68. Although section 4502, subdivision (a), specifically lists the weapons that are prohibited in state prison, without objection, the jury in this case was only instructed to determine whether appellant possessed, on specified occasions, "any instrument or weapon commonly known as sharp instrument." (8RT 1652; 10CT 2739.)

69. The trial court also instructed the jury on the duty to submit to reasonable force, the right use reasonable force to defend against excessive force (8RT 1651-1652; 10CT 2737) and that actual danger is not necessary for self-defense. (8RT 1652; 10CT 2738.)

70. CALJIC No. 16.141 reads as follows:

> As used in the foregoing instruction, the words "force and violence" are synonymous and mean any unlawful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude or angry manner, is sufficient.
>
> It is not necessary that the touching be done in actual anger or with actual malice; it was sufficient if it was unwarranted and unjustifiable.

special, technical definition which defines battery as "[t]he slightest unlawful touching," the instructions were inadequate and misleading, because they failed to make clear that the meaning of "force or violence" for purposes of factor (b) was not the same as the meaning of "force and violence" for battery.

Because the jurors decide whether the unadjudicated crime, if proved, qualifies as a factor (b) aggravator, they must understand the meaning of the "force or violence" language in that provision. Generally, there may be no need to instruct on the common-sense understanding of "force or violence" under factor (b) because it will be readily apparent. (*People v. Dunkle*, *supra*, 36 Cal.4th at pp. 922-923 [failure to instruct on common meaning of "force or violence" in residential burglary was not error where defendant's own statements supported an inference that he "armed himself with the scissors, entered the sleeping girl's bedroom and disturbed the quilt before being interrupted"].) But that is not true where, as here, battery is one of the alleged crimes underlying the factor (b) aggravator. In such as case, as here, the jury is instructed in the specialized "slightest unlawful touching" definition of "force and violence" under section 242 (see 12 RT 1397); the evidence presented by the prosecution to prove the battery(s) involves only minimal touching; and nothing else about the factor (b) evidence conveys the common-sense meaning of "force or violence" that defines the activity admissible under this aggravator. In this situation, where the other-crimes

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> The touching essential to a battery may be a touching of the person, of the person's clothing or of something attached to or closely connected with the person.

(8RT 1650-1651; 10CT 2736.)

evidence involved a trivial use of force, a juror likely would equate the technical "simple unlawful touching" definition of "force and violence" given in CALJIC No. 16.141 with the "force or violence" requirement in factor (b). (Cf. *People v. Davis*, *supra*, 10 Cal.4th at pp. 541-542 [no likelihood that jury would have misapplied the battery instruction where the batteries – kicking victim, lunging at victim with sword, slashing victim with knife, and striking and choking victim – "indisputably involved the use of 'force' and 'violence' and 'threats' of violence under their common connotations"].)

The trial court's instructions on factor (b) neglected to inform the jury that two separate requirements relating to "force" and "violence" applied to their assessment of the criminal activity submitted pursuant to factor (b)– one, defined by CALJIC No. 16.141, for its determination of whether the prosecution had proved beyond a reasonable doubt that appellant had committed batteries on March 12, 1997 or April 18, 2000 and another, left wholly undefined, for its determination of whether any of the factor (b) allegations, if proved, qualified for their consideration as a factor (b) aggravator. In this context, the instructions were ambiguous. A juror is likely to have reasonably but erroneously applied the only definition provided by the instructions to all the determinations regarding "force" and/or "violence" he or she had to make with regard to the factor (b) evidence.

In this case, the alleged other crimes involved either no force or threat of force at all, such as the possession of weapons incidents on November 13, 1999, April 14, 2000, April 15, 2000 and April 18, 2000, and the assaults alleged on March 8, 1997, March 13, 1997, December 18, 1997, November 13, 1999, November 14, 1999, and April 18, 2000; or minimal force and no

violence by appellant, such as the battery incidents that allegedly occurred on March 12-13, 1997 and on April 18, 2000. Because the instruction containing the only definition of force or violence was the instruction on battery, the jury likely could have concluded that *any* force or threat thereof, entitled them to place all alleged criminal activity "on death's side of the scale" (*Stringer v. Black* (1992) 503 U.S. 222, 232), even though, each incident was not sufficiently probative of appellant's propensity for violence to warrant its weighing at the penalty phase. In this way, there is a reasonable likelihood that in violation of the Eighth Amendment requirement of reliable and non-arbitrary capital-sentencing, the incomplete instruction misled at least some jurors to give aggravating weight to a trivial incident that should not have influenced their death verdict. *(Boyde v. California* (1990) 494 U.S. 370, 380 [stating standard of review for ambiguous penalty-phase instructions].)

G. Adjudication of the Uncharged Criminal Activity Evidence at the Penalty Phase under the Applicable State Procedural Rules Violated Appellant's Federal Constitutional Rights

The admission of the factor (b) evidence violated appellant's rights to due process of law, heightened reliability in capital-sentencing, a fair trial by an impartial jury, and equal protection of the law under the Sixth, Eighth and Fourteenth Amendments to the federal Constitution in multiple ways. Appellant acknowledges that this Court previously has rejected constitutional challenges to the use of unadjudicated crimes as aggravating factors at the penalty phase of a capital case. (See *People v. Balderas* (1985) 41 Cal.3d 144, 204-206; see also, *e.g., People v. Hughes* (2002) 27 Cal.4th 287, 284, fn. 24; *People v. Gallego* (1990) 52 Cal.3d 115, 195.) However, the constitutionality of admitting unadjudicated other-crimes evidence at a

capital penalty phase is a "recurring issue" on which the "State's highest courts have reached varying conclusions." (*Robertson v. California* (1989) 493 U.S. 879 [dis. opn. of Marshall, J. from denial of certiorari]; see *Williams v. Lynaugh* (1987) 484 U.S. 935 [dis. opn. of Marshall, J. from denial of certiorari asserting that "whether a State violates the Equal Protection Clause when it permits the sentencer to consider evidence of unadjudicated offenses in capital cases but not in noncapital" was a question worthy of the Court's consideration].) Accordingly, appellant presents the federal constitutional claims to preserve them for possible federal habeas corpus review and asks the Court to reconsider its ruling in *Balderas* and subsequent decisions permitting the use of evidence of unadjudicated crimes at the penalty phase. (See *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 303-304.) The use of the evidence of each of the ten incidents to prove unadjudicated offenses at appellant's penalty phase resulted in separate but related constitutional violations.

1. Use of the Same Jury That Found Appellant Guilty of Four Capital Offenses to Adjudicate the Uncharged Other Crimes Violates the Federal Constitution

The adjudication of the alleged uncharged crimes by the same jury that had just found appellant guilty of capital murder violated his Eighth Amendment right to a reliable determination of penalty, his Fourteenth Amendment due process right to a fair sentencing trial, and his Sixth and Fourteenth Amendment rights to a penalty determination by an impartial jury. Having just convicted appellant of four capital offenses based on two killings, as well as assault by a life prisoner on a correctional officer, and returning true findings on the special circumstances, the jury could not be impartial regarding appellant's guilt of the unadjudicated crimes. (*Irvin v.*

Dowd (1961) 366 U.S. 717, 727-728 [right to an impartial jury was violated in capital case where jurors during voir dire expressed opinion that defendant was guilty]; *Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554 [Sixth Amendment guarantee of an impartial jury is violated if juror who sat in a previous case in which the same defendant was convicted serves on defendant's jury in another similar prosecution close in time], relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

As a result of this bias, the jury was less likely to presume appellant innocent of the alleged offenses and more likely to find him guilty of those crimes upon proof that was less than the constitutionally-mandated standard of proof beyond a reasonable doubt. This problem was particularly acute here for several reasons. First, as shown in detail above, the prosecution failed to meet its burden of proving the elements of each of the uncharged offenses beyond a reasonable doubt for a majority of the crimes alleged. Each of these offenses involved appellant's conduct in state prison. Coming on the heels of the jury's verdicts finding appellant guilty of four capital crimes stemming from two killings as well as a separate assault, all of which also occurred in state prison, it is likely the jury assumed appellant committed the offenses alleged, even though the evidence was not sufficient for them to do so.

Second, there was a significant question as to whether some of the offenses actually involved force or violence. Nonetheless, the jury was not directed to find these elements before deciding whether any of the unadjudicated activity could be considered as evidence in aggravation pursuant to factor (b). Under these circumstances, the jury would be more

likely to view the other crimes as involving force or violence precisely because they just convicted appellant of four capital offenses and an additional assault. Thus, the problem of jury bias likely affected the very determination that the factor (b) evidence required them to make.

The lack of an impartial adjudicator with respect to the determination of the factor (b) aggravating evidence, which weighed in favor of a death sentence, created a substantial risk of an erroneous, unfair and unreliable penalty verdict. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585 ; *Gardner v. Florida* (1977) 430 U.S. 349, 362; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 952-953 [admission of murders for which defendant was not convicted violates state constitution and due process]; *State v. Bartholomew* (Wash. 1984) 683 P.2d 1079, 1082 [admission of evidence of a defendant's prior criminal activity (other than convictions) violates the Eighth Amendment and also state Constitution]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276, 279-280 [admission of unadjudicated homicide at capital-sentencing trial violates due process clause of Fourteenth Amendment].)

Third, the cumulative effect of so many prison incidents prejudiced the jury's determination as to each of them. By consolidating the jury's adjudication of ten separate incidents in the same proceeding, the evidence of one alleged crime spilled over to, and bolstered the proof of, each of the others. The cumulative effect of presenting evidence of multiple incidents and multiple allegations of other crimes erroneously inflated the strength of the aggravating factors and again unfairly skewed the penalty phase in favor of death in violation of the Eighth Amendment's mandate of reliable capital sentencing and the Fourteenth Amendment's due process guarantee of a fair trial.

2. The Failure to Require Unanimous Jury Findings that the Prosecution Proved Each Unadjudicated Offense Beyond a Reasonable Doubt Violates the Federal Constitution

Under section 190.3, there is no requirement that the prior criminality be found true by a unanimous jury. (*See People v. Caro* (1988) 46 Cal.3d 1035, 1057.) With regard to all of the uncharged crimes allegations, the jury was instructed, pursuant to CALJIC No. 8.87, that "[i]t is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror many consider that activity as a fact in aggravation." (8RT 1647; 10CT 2730.) The prosecutor argued this point to the jury in his penalty phase argument in this case, reminding them that "there's no unanimity required." (8RT 1659.) The failure to require jury unanimity with respect to each of the unadjudicated crimes allegations violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. The United States Supreme Court's decisions in *Cunningham v. California* (2007) 549 U.S. 270, 127 S.Ct. 856, 864-865, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, confirm that the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment require that all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant asks this Court to reconsider its holdings to the contrary. (See, e.g., *People v. Ward* (2005) 36 Cal.4th 186, 221-222.)

Finally, the disparate treatment of capital and non-capital defendants

with regard to factor (b) evidence violates the federal Constitution. Because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an inconsistent and irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's right to due process under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

For all these reasons, this Court should reconsider its position regarding the constitutionality of admitting evidence of unadjudicated crimes at the penalty phase.

H. Admission and Reliance on Evidence of the Unadjudicated Crimes at the Penalty Phase Requires the Reversal of Appellant's Death Sentences in This Case

The trial court erred in finding the evidence before it sufficient to even warrant admission of two of the ten separate incidents the prosecution relied on to demonstrate unadjudicated criminal activity under factor (b). It also provided incomplete instructions that likely misled at least some jurors to give aggravating weight to many of the incidents that should not have influenced their death verdict. With regard to seven of the incidents, even after all the evidence was presented to the jury, the prosecution could not establish the elements of the alleged criminal offenses beyond a reasonable doubt. As such, no juror should or could have properly considered any of these incidents in determining appellant's penalty. For all these reasons, appellant's death sentences must be reversed.

1. Use of the Invalid and Factually Insufficient Factor (b) Aggravators Unconstitutionally Skewed the Penalty Selection Process Toward Death

Pursuant to the rule in *Brown v. Sanders, supra*, 546 U.S. at p. 220), an improper sentencing factor (whether an eligibility factor or not) renders a sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. Although not defined by the majority, the dissenting justices found that an improper sentencing factor is "a factor that the law forbids the jury from considering as aggravating and that the jury's use of which (for this purpose) was later invalidated on appeal." (*Id.* at p. 230, dissent of Breyer & Ginsburg.)

Where, as here, the evidence is insufficient to support any one of the factor (b) incidents, California law prohibits any juror from considering that factor in weighing the aggravation against the mitigation. The jury's use of these incidents as aggravating factors should be invalidated by this Court. Thus, even if the evidence is admissible as a foundational matter,[71] the prosecution's ultimate failure to prove the elements of each unadjudicated offense violated the constitution pursuant to *Sanders*, because an individual juror could *not* "give aggravating weight to the same facts and circumstances" introduced under factor (b) under any other sentencing factor. None of these incidents presented the same facts and circumstances

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71. The trial court made express rulings on the admissibility of two of the incidents. As appellant argues above, those rulings were erroneous, and but for that error, evidence of the two incidents would not have been admissible. Even if this Court finds that the evidence of those two incidents was properly admitted, however, their consideration in aggravation still skewed the penalty determination, resulting in constitutional error.

as the charged murders or the battery of Eric Mares, i.e. "the circumstances of the crime(s)" made relevant pursuant to section 190.3, subd. (a)). Nor did they present the same facts and circumstances of appellant's prior convictions made relevant pursuant to section 190.3, subd. (c)), or any of the other sentencing factors listed in section 190.3. Because no juror could legitimately have considered anything at all about these seven incidents as aggravation in any capacity at the penalty phase, the presentation of the factor (b) incidents skewed the jurors' balancing of aggravating and mitigating factors in favor of death in violation of the Eighth Amendment. (*Brown v. Sanders*, *supra*, 546 U.S. at p. 221.)

Regardless of whether the legal and factual insufficiency of the factor (b) aggravation in this case comes within the *Sanders'* rubric of invalid sentencing factors or not, a jury's penalty verdicts based on factual findings that are not supported by constitutionally sufficient evidence cannot be upheld. Independant of *Sanders*, the insufficiency of the factor (b) evidence at the penalty phase violated the Eighth and Fourteenth Amendments by undermining the reliability of the jury's death verdict and violating appellant's state law liberty interests. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [a death sentence based upon "materially inaccurate" information may violate the Eighth and Fourteenth Amendments]; *Robinson v. Schriro* (9th Cir. 2010) 595 F.3d 1086, 1103 [recognizing that in certain circumstances, insufficiency of evidence supporting aggravating factors can constitute independent due process or Eighth Amendment violations]); *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295 [state trial court's misapplication of its capital sentencing statute implicates the Eighth Amendment's prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth

Amendment].)

2. The Violations of State Law and the State and Federal Constitutions Regarding the Unadjudicated Crimes Evidence Were Not Harmless

Appellant has shown that the jury's penalty decisions were unconstitutionally skewed by the introduction of invalid sentencing factors. Adding an invalid aggravating factor to "death's side of the scale," renders the penalty determination unreliable in violation of the Eighth Amendment. (See *Stringer* v. *Black* (1992) 503 U.S. 222, 232.) In *Brown v. Sanders*, the Supreme Court eliminated the distinction between weighing and non-weighing states for purposes of appellate review of capital cases. *(Brown v. Sanders, supra,* 546 U.S. at p. 220.) While prior cases had found that a state appellate court in a non-weighing state could uphold a sentence despite the presence of an invalid sentencing factor without concluding that the inclusion of the invalid factor was harmless error or reweighing the sentencing factors itself, in *Sanders* the Court found that the presence of an invalid factor should be treated the same in both weighing and non-weighing states. (*Id.*) Accordingly, since constitutional error has been established, this Court cannot uphold appellant's death sentences unless it finds the error was harmless beyond a reasonable doubt. (See e.g. *People v. Lewis, supra*, 43 Cal.4th at p. 522 [Applying *Sanders* and upholding conviction because any error caused by invalidated special circumstance findings was harmless "under any standard" and did not affect penalty verdict.] It cannot do so here.

As this Court has recognized, "other-crimes evidence" is a type of evidence which "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (People v. Polk

(1965) 63 Cal.2d 443, 450; *People v. Robertson, supra,* 33 Cal.3d at p. 54.) Here the prosecution presented evidence of ten separate incidents, each of which, it argued, established that appellant had committed one or more crimes of force or violence. The jury was instructed it could consider each of those other crimes as a factor in aggravation weighing towards imposition of the death penalty.

Despite the nature of appellant's capital crimes and the guilt phase evidence regarding his in-custody behavior, the presentation of so many insufficient and/or irrelevant incidents of misconduct and unproven criminal activity cannot be found harmless under any standard. Under California's death penalty scheme, the penalty phase jury makes no written findings as to factors in aggravation (*People v. Lewis, supra,* 43 Cal.4th at p. 533). Because there are no findings of fact, this Court cannot determine what unadjudicated crimes evidence any juror actually found proven beyond a reasonable doubt and what evidence was properly rejected. It thus has no basis to conclude that no juror based his or her penalty decision on any, some or all of the invalid or insufficiently proven sentencing factors. In such a situation, this Court must "presume that at least one did so. Otherwise, [the Court] would run an unacceptable risk of rejecting a potentially meritorious claim by gratuitously denying the existence of its factual predicate." (*People v. Clair* (1992) 2 Cal.4th 629, 680.)

Here, virtually the entire prosecution penalty case was devoted to presenting evidence of appellant's in-custody misconduct. In addition to live testimony, it insisted on showing videotapes of many of the incidents, during which appellant can be seen in his cell like a caged animal, and out of his cell, wearing nothing but his boxer shorts, surrounded by burly correctional officers in full riot gear. Even if the evidence was sufficient to support *some*

of the alleged criminal activity during one or more of the incidents, inclusion of so many unsupported incidents rendered it virtually impossible that each juror properly assessed whether the elements of each alleged offense was established beyond a reasonable doubt for each incident before adding it to the aggravation side of the penalty scale.

There is thus a reasonable possibility that the jury's consideration of these unproven and invalid aggravating factors affected the penalty verdicts (*People* v. *Brown* (1988) 46 Cal.3d 432, 447), and such consideration cannot be found harmless beyond a reasonable doubt as not contributing to the sentence rendered. (*Chapman* v. *California, supra,* 386 at p. 24.) Accordingly, appellant's death sentences must be reversed.

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VI.
CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected arguments pointing out these deficiencies. In *People v. Schmeck, supra*, 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) Meeting this criterion requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 19 special circumstances (one of which – murder while engaged in felony under subdivision (a)(17) – contained nine qualifying felonies).

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application of Section 190.3(a) Violated Appellant's Constitutional Rights

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (See CALJIC No. 8.85; 8RT 1644, 10CT 2727) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court has never applied any limiting construction to factor (a).

(*People v. Blair* (2005) 36 Cal.4th 686, 749 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges this Court to reconsider this holding.

C. The Death Penalty Statute and Accompanying Jury Instructions Fail to Set Forth the Appropriate Burden of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see

People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence.

Blakely v. Washington (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 530 U.S. 584, 604, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478, require any fact that is used to support an increased sentence (other than a prior conviction) to be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 8RT 1698-1700, 10CT 2748.) Because these additional findings were required before the jury could impose the death sentence, *Blakely*, *Ring* and *Apprendi* require that each of these findings be made beyond a reasonable doubt. The trial court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring*

impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, the sentencer of a person facing the death penalty still is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair*, *supra*, 36 Cal.4th at p. 753.) Appellant requests that this Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in

aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (8RT 1644-1646, 10CT 2727-2728; 8RT 1698-1700, 10CT 2748), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the

jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749) This Court reaffirmed this holding after the decision in *Ring v. Arizona, supra.* (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Prieto was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating

circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), by its inequity violates the equal protection clause of the federal Constitution and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (25 RT 8437.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990)

494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity as to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S.

at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should Be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and

adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. 8th & 14th Amends.) and his right to the equal protection of the laws (U.S. Const. 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing to Require That the Jury Make Written Findings Violates Appellant's Right to Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during

the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions to the Jury on Mitigating and Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; Pen. Code, § 190.3, factors (d) and (g); 8RT 1644-1646, 10CT 2727-2728) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (See, e.g., CALJIC No. 8.85 (e) [victim participation], (f) [moral justification], (g) [duress or domination], (i) [age of defendant], (j) [minor participation].) The trial court failed to omit those factors from the jury instructions (8RT 1644-1646, 10CT 2727-2728), likely

confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook, supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (8RT 1644-1646, 10CT 2727-2728.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Stringer v. Black* (1992) 503 U.S. 222, 230-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-case Proportionality Review Guarantees Arbitrary and Disproportionate Imposition of the Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates the Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rules 4.421 and 4.423.) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances

apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider.

H. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms

This Court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* , *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the U.S. Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

CONCLUSION

For all the foregoing reasons, appellant's convictions must be reversed and his judgments of death vacated.

DATED: July 23, 2012

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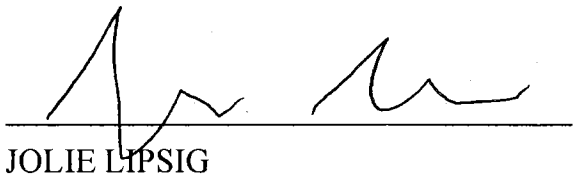
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.630 (b)(2)

I, Jolie Lipsig, am the Senior Deputy State Public Defender assigned to represent appellant Anthony Gilbert Delgado, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 62, 089 words in length excluding the tables and this certificate.

DATED: July 23, 2012



JOLIE LIPSIG
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DECLARATION OF SERVICE

Case Name: ***People v. Anthony Delgado***
Case Number: **Kings County Superior Court No. 99CM7335**
Supreme Court No. S089609

I, the undersigned, declare as follows:
I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S OPENING BRIEF

/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ X / placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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I declare under penalty that the foregoing is true and correct and that this declaration was executed on July 23, 2012, in Sacramento, California.

Saundra Alvarez

Saundra Alvarez